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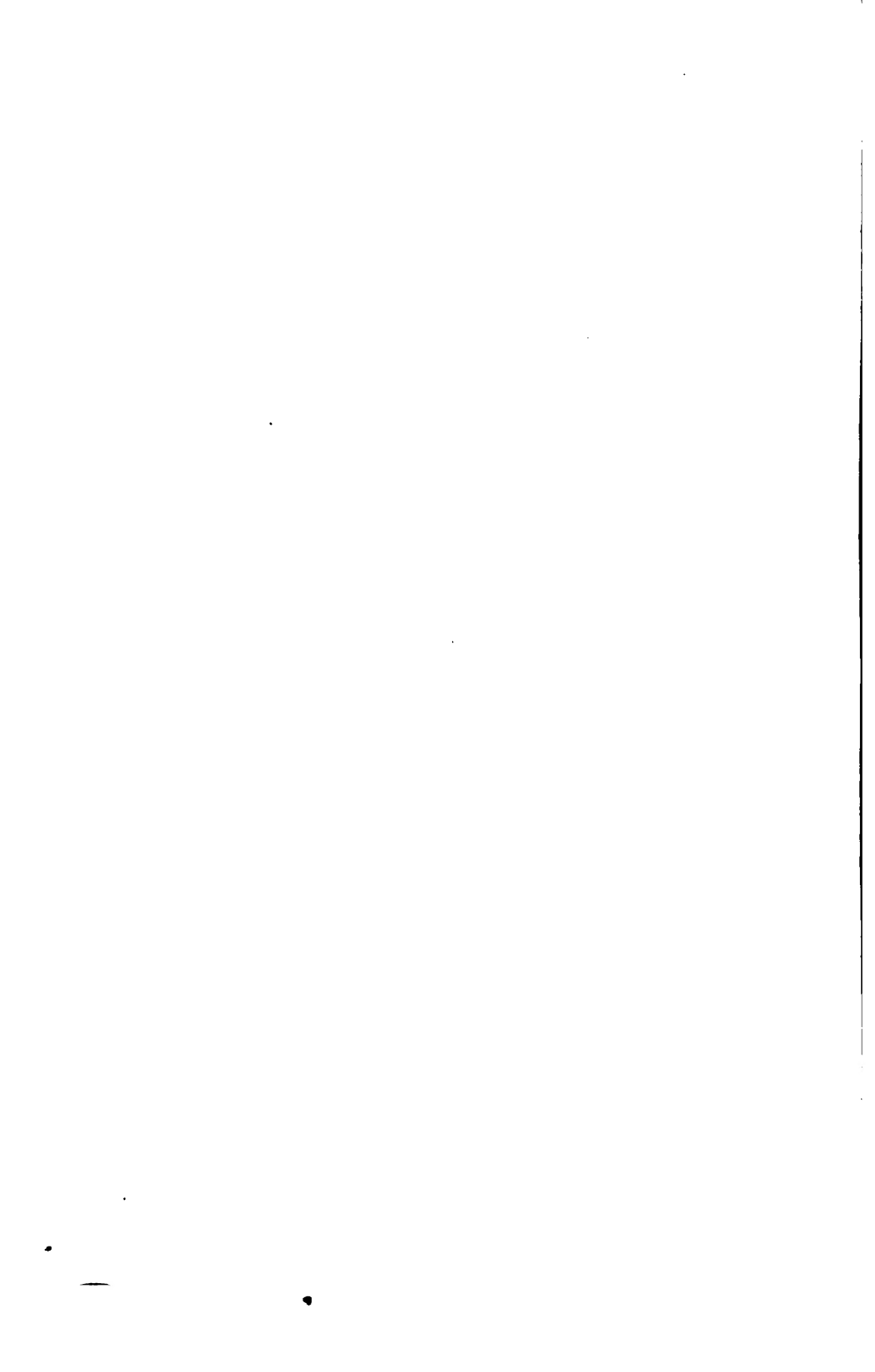
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83
June 17

REPORTS OF CASES

DECIDED IN THE

SUPREME COURT

OF THE

STATE OF OREGON

ROBERT G. MORROW
REPORTER

VOLUME 34

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CASES DECIDED
IN THE
SUPREME COURT
OF
OREGON.

Decided 14 September, 1898.

NICKERSON v. NICKERSON.

[48 Pac. 423; 54 Pac. 277.]

1. **APPEAL—ABATEMENT OF ACTION.**—The death of the husband pending an appeal by him from a decree of divorce which determines the property rights of the parties, does not abate the action nor the appeal; but both survive to the heirs of the deceased: *State v. Martin*, 30 Or. 108, cited.
2. **DIVORCE—CRUELTY.***—It is no ground for divorce that plaintiff was unable to get along with defendant's son by a former marriage, who was impudent, saucy, and sometimes abusive, to her, and that defendant refused to send away his son when plaintiff said one of them must go, and that on her returning, and attempting to enter the house, she was prevented by the son from doing so; the conduct of the son not having been encouraged or approved by defendant.

From Linn: HENRY H. HEWITT, Judge.

Suit by Elizabeth M. Nickerson against Hugh Nickerson for a divorce on the ground of cruelty, in which she had a decree. Defendant appealed and died, whereupon there was a motion to dismiss the appeal, which was denied and the cause finally reversed.

MOTION OVERRULED: REVERSED.

*NOTE.—A monograph of fifteen pages on Cruelty as a Ground for Divorce is printed in 65 Am. St. Rep. 69, where the authorities (including the Oregon cases) are grouped in proper classes. See, also, authorities collected in a note, Cruelty and Inhuman Treatment as a Ground for Divorce, 6 L. R. A. 187, and Drunkenness as Affecting Cruelty, 34 L. R. A. 454.—REPORTER.

For appellant there was a brief over the name of *Whitney & Newport*, with oral arguments by *Messrs. N. M. Newport, Melvin C. George, and Wm. M. Gregory*.

For respondent there was a brief over the name of *Weatherford & Wyatt*, with oral arguments by *Mr. Jas. K. Weatherford*.

ON MOTION TO DISMISS THE APPEAL.

MR. JUSTICE WOLVERTON delivered the opinion.

1. The plaintiff, on January 27, 1896, obtained a decree of divorce against the defendant, and thereby the title to an undivided third of defendant's real property. The defendant sought a divorce, also, by cross bill, which was dismissed. After an appeal had been perfected the defendant died, and both parties, by their respective attorneys, upon suggesting his death, filed motions to dismiss the appeal, but for very different purposes. Counsel for defendant claims that his death abates the suit, and that this Court should dismiss the appeal, with directions to the court below to dismiss the suit, so that the relation of the parties would then stand as if no suit had ever been begun or decree rendered; while the plaintiff claims that defendant's death abates the appeal only, and that the decree of the court below remains in full force and effect, as a final determination of the rights of the parties thereto. Neither position can be maintained. In *Day v. Holland*, 15 Or. 464 (15 Pac. 855), it was decided that under the Code procedure an appeal from a decree does not break it up nor vacate it, and that it may be carried into execution notwithstanding the appeal, unless stayed by a supersedeas undertaking. We are aware that there is a strong dis-

senting opinion in the cause cited, wherein cogent reasons are given why the old equity practice should still prevail in that regard, notwithstanding the innovations of the Code; but we feel bound by the prevailing opinion, and are constrained to follow it as a precedent. It is provided by statute that "No action shall abate by the death, marriage, or other disability of a party, or by the transfer of any interest therein, if the cause of action survive or continue;" and that "An action for a wrong shall not abate by the death of any party, after the verdict has been given therein, but the action shall proceed thereafter in the same manner as in cases where the cause of action survives." Hill's Ann. Laws, §§ 38, 39. These appear to be all the statutory provisions pertaining to the subject.

It is quite apparent, from the very nature of things, that the cause of suit does not survive the death of a party where the only relief sought is a dissolution of the marriage relations, for death effectuates more surely the very end which it is the especial purpose of the suit to accomplish. As was said by COTTON, L. J., in *Stanhope v. Stanhope*, 11 Prob. D. W. 103, 105, "It would be a singular thing, if, after the marriage had been dissolved by death, there were power to declare it at an end on another ground." The authorities are uniform upon this proposition: See *Barney v. Barney*, 14 Iowa, 189; *Wilson v. Wilson*, 73 Mich. 620 (41 N. W. 817); *Kirschner v. Deitrich*, 110 Cal. 502 (42 Pac. 1064); *Pearson v. Darrington*, 32 Ala. 253; *McCurley v. McCurley*, 45 Am. Rep. 720. But, where the consequences of the divorce are such as affect the property rights of the parties to the suit, the heirs or personal representatives may have such an interest in the litigation as that the cause will survive, not for the purpose of continuing the controversy touching the right of divorce within itself; but

for the ascertainment of whether the property has been rightfully diverted from its appropriate channel of devolution. The present case furnishes a good illustration. Had the defendant died prior to the divorce, his real property would have descended to his heirs, subject to his widow's right of dower, but under the decree she obtains an undivided one-third interest absolute therein, results of very different significance. So that the heirs have an interest in continuing the controversy to determine whether they have been rightfully or wrongfully affected in their property rights : See *Thomas v. Thomas*, 57 Md. 504 ; *Downer v. Howard*, 44 Wis. 82.

It has been suggested that the relief which the statute affords by giving the prevailing party in the suit a one-third interest in the lands of the spouse is but an incident to the divorce, and operates as a penalty for a violation of the marital relations. And so it is, but it does not follow that the suit, after divorce granted, or even that the appeal, abates upon the death of a party thereto. At common law the general rule is that criminal actions abate with the death of the accused, but if the crime be that of treason, or felony which works an attainder, the heirs or personal representatives may prosecute an appeal to reverse the attainder (*State v. Martin*, 30 Or. 108, 47 Pac. 196), although the forfeiture is but an incident of the action. The cause was permitted to survive to prevent a wrongful devolution of the property of the deceased, should it appear that the judgment of attainder was erroneous. The analogy is apparent without elucidation. The clause of the statute preventing either party from contracting marriage with a third until the period allowed for the appeal has expired is a wise precautionary measure to prevent the evil results which might arise from conflicting marriage relations should the decree of the court below be

reversed, but was not intended to suspend the decree. Such a decree has the "effect to terminate the marriage," and its finality must be governed and determined by the same rules as are applied in other suits in equity. From these considerations we conclude that the suit did not abate by the death of the defendant, except as it pertains to the cross bill, neither does the appeal, but that the cause and the appeal both survive to the heirs of the deceased, and they may prosecute the cause in this Court for the purpose of determining whether the divorce was rightfully granted, to the end that conflicting property rights as between them and the plaintiff may be settled and determined. Both motions will therefore be disallowed.

MOTIONS OVERRULED.

ON THE MERITS.

MR. JUSTICE BEAN delivered the opinion.

2. This is a suit for divorce. The allegations of the complaint are to the effect that a son and daughter of the defendant by a former marriage grossly mistreated and abused the plaintiff, with the defendant's consent and knowledge, and so poisoned his mind against her that, on or about the first of June, 1894, he compelled her to leave home, and remain away, and he has since refused to live and cohabit with her as his wife. The plaintiff had a decree in her favor, and the defendant appealed.

The evidence is somewhat voluminous, but we do not deem it necessary to discuss it at any considerable length. It appears that the plaintiff and defendant were married in March, 1883, and were both at the time well advanced in years, the plaintiff being sixty years of

age and the defendant some six years her senior. Both parties had been previously married, and two of defendant's minor children—a boy named Elmer, about twelve, and a daughter named Nettie, some four years of age—became members of plaintiff's and defendant's family, and continued to live with them until the time of their separation. The personal relations between the plaintiff and defendant were at all times of the most pleasant character, and no claim is made that the defendant ever mistreated, abused or neglected her in any way. The unfortunate separation was the result of the inability of plaintiff to live agreeably with the children of the defendant, and especially his son, Elmer. It seems that for some time before the separation the relations between the plaintiff and Elmer were unpleasantly strained, and she claims that she remonstrated with the defendant about Elmer's conduct, and that he refused to control him, and that finally, because she could not get along with Elmer, the defendant compelled her to leave home.

For the defendant the contention is that the plaintiff left voluntarily because he would not drive his son away from home, and we are of the opinion that this is the most probable theory of the case. It is simply one of those unfortunate separations which often take place between a husband and wife on account of the children of one or the other by a former marriage. That Elmer was impudent, saucy, and sometimes abusive, to his stepmother, is unquestioned; but his conduct was not of such a character as to justify her in leaving her husband on that account, even if, as she says, he was unable to control his son. Elmer's conduct was neither encouraged nor approved by the defendant, and he seems to have done all that could reasonably be expected of him to promote harmony in the family. And, besides, plaintiff was not altogether blameless. She did not show

that kindly regard for the welfare of her stepson which should characterize the conduct of an adopted mother. She was indifferent to his comfort. He was locked out of the house, and compelled to sleep in the barn or elsewhere, if he was not home by a given time; he went without his meals if he was not on hand promptly at meal times, and in many other ways the conduct of the plaintiff was such as was calculated to harass, annoy, and vex him. Of course, this was no excuse for his conduct, but it does afford a reason why it should not be deemed sufficient to support a decree of divorce.

The plaintiff claims that she was driven away from home by the defendant, but the evidence of numerous witnesses is to the effect that she had repeatedly said that she and Elmer could not live in the same house, and that, if the defendant did not make him leave, she would go herself; and these witnesses are practically corroborated by her own testimony, for, when asked on her direct examination to tell all that occurred at the time her husband told her to leave, she said: " 'Well,' he says to me, he says, 'you want me to do what you wouldn't do yourself,' and I says, 'What's that?' I asked him what that was, and he says, 'You want me to drive Elmer off.' I says, 'No, I never said anything of that kind; I never told you to do that; I never said any such thing.' Then he says, 'I want you to go and talk with Elmer,' and I says, 'No, I won't do that;' and then he wanted me to go with him, and I says, 'No, I won't do any such thing.' Then he says, 'That settles it; you will have to go.' " And the testimony of the other witnesses on behalf of the plaintiff, who were present at the time, is substantially to the same effect. This indicates very clearly that plaintiff had suggested, if not demanded, that the defendant should compel Elmer to go away from home, and that the matter was being discussed by them at the time; and,

further, that the defendant showed a much stronger disposition to have the plaintiff make her peace with Elmer than she herself exhibited, and, when she refused to make any attempt whatever to reconcile her difference with him, the defendant said, "That settles it; you will have to go," meaning, no doubt, that such could be the only result of the conditions imposed by her. Much is claimed for the fact that a few days after she left home she returned, and, on attempting to enter the house, was prevented from doing so by Elmer. But both parties were no doubt to blame in this transaction. She was evidently attempting to assert her right, as she claimed, to enter the house, whether she was welcome or not; and Elmer, prompted by a like spirit, was endeavoring to prevent her from doing so. Nothing can be justly claimed on either side from this incident. The whole secret of the trouble in this case, as clearly appears from the testimony, was the inability of the plaintiff to live amicably with the defendant's children; but that is no ground for a divorce. Such a condition of affairs is one of the probable incidents of a marriage of that character.

And, besides, this case smacks very largely of a suit instituted for the purpose of acquiring property rights, rather than a dissolution of the marriage contract. At the time it was instituted the defendant was seventy-six years of age, in feeble health, and has since died. Before the consummation of the marriage, both parties were the owners of real and personal property of about equal value, in view of which they entered into an antenuptial contract, by which it was stipulated and agreed "that the property of each shall be and remain separate, and that we do waive all claim of right of dower and curtesy to the personal or real property of each other that the laws of Oregon do or may permit, and that the debts of each shall be paid out of the property of the party contracting such debts;" and

“that at the decease of either of the above contracting parties that the other or remaining party will deliver up any or all property belonging to the deceased, to his or her legal heirs of the body, or any other legal representatives, and to claim no part or portion of the same.” It is claimed, and may be conceded for the purposes of the case, that, notwithstanding this contract, the successful party in a proceeding for a divorce would, under the statute, be entitled to an undivided one-third of the real property of the other, yet it affords a cogent reason why this Court, before affirming the decree of the court below, should be certain that it is fully supported by the testimony, when its only effect is to vest the title to a large amount of property belonging to one of the contracting parties in the other, contrary to the spirit, if not the letter, of an antenuptial contract solemnly entered into. From a careful examination of all the testimony in this case and the argument of counsel, we are constrained to hold that the decree of the court below should be reversed, and it is so ordered.

REVERSED.

Decided at PENDLETON, 13 August; rehearing denied 14 September, 1898.

NORTH POWDER MILLING CO. v. COUGHANOUR.

[54 Pac. 223.]

PRESUMPTION AS TO INTEREST DEEDED.—The grantor in a deed of part of the land owned by him will be presumed to have intended to convey and the grantee to have intended to take the premises as they openly and visibly appeared at the time the sale was consummated, where the intention of the parties is not discoverable from an inspection of the deed, and proof of actual knowledge of the contracting parties with reference to the physical condition of the premises cannot be obtained; but where the actual intent of the parties is shown it will control.

CONSTRUCTION OF GRANT OF WATER RIGHT.—The owner of a mill and an appurtenant water right was unable to get wheat to grind, and hence appropriated a portion of the water of a tributary creek eleven miles above the mill

34	9
37	259
34	9
39	70
34	9
42	80
34	9
44	200
44	394
34	9
46	115
34	9
48	284

to irrigate land to be cultivated in wheat. Afterwards he conveyed the land, irrigation ditch, and appurtenant water right, without reservation, representing that part of the land needed water only in dry seasons, and that the water could be sold to good advantage; that he owned the water right on account of the mill; that the ditch could be enlarged to any size; and that the land would make one of the best wheat farms in the valley. *Held*, that the grantee's right was limited to the use of water to irrigate land for the growth of wheat.

WATER RIGHT—PRIORITY.*—One to whom the owner of a mill sends a letter, stating that if he buys certain land from the writer the latter will give him, on paying a specified amount, half of a ditch diverting water from the mill race, cannot claim any interest in the water of such ditch as against one to whom the mill is sold before the deed to the ditch is executed.

WATERS—RIGHT OF RIPARIAN PROPRIETOR.—The first settler on a stream may either divert the water or exercise his common law right to have it flow in its accustomed channel, but he cannot do both; the two rights are incompatible.

ADVERSE USER—LIMITATION OF ACTION.—A right by adverse user cannot be acquired to water in a stream or ditch so long as there is enough for both or all claimants; and until some one's use is curtailed there cannot be a cause of action against which to invoke the statute of limitations.

PLEA IN ABATEMENT.—Where one who is sued for diverting water from a prior appropriator defends on the ground that the water was diverted by others after it passed him, it is in the nature of a plea in abatement, and is demurrable if the defect of parties defendant does not appear on the complaint, and defendant does not name the omitted parties.

From Union: ROBERT EAKIN, Judge.

Suit to enjoin the diversion of the waters of a natural stream. Plaintiff had a decree and defendants appeal.

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AFFIRMED.

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For appellants there was a brief over the name of *J. H. Slater and Sons*, with an oral argument by *Mr. Robert J. Slater*.

For respondent there was a brief over the name of *Thos. H. Crawford*, with an oral argument by *Mr. Geo. G. Bingham*.

*NOTE.—See 80 Am. St. Rep. 799 for a valuable note considering What Constitutes an Appropriation of Water; and also 90 L. R. A. 665, where there is an extensive note on the Right of Prior Appropriation of Water.—REPORTER.

MR. CHIEF JUSTICE MOORE delivered the opinion.

This is a suit by the North Powder Milling Company, a corporation, against W. A. Coughanour and S. M. Duff, his agent, to enjoin them from diverting the waters of a natural stream, and to recover damages alleged to have been sustained by reason of such diversion. The material facts are that in 1870, one N. Tartar commenced the construction of and two years thereafter completed a flour mill on the left bank of the North Powder River at the town of North Powder, Union County, Oregon, and diverted water from the river at a point about one mile west of the mill site, which he conducted in a race-way, and made a prior appropriation thereof by applying it to a "home-made" wooden turbine wheel, about thirty-six or forty inches in diameter, which propelled the machinery in said mill, consisting of one set of four foot burrs, one set of eighteen-inch chopping burrs, elevators, cleaners, suction fan, smut mill and bolting machine. April 25, 1878, Tartar conveyed an undivided one-half interest in said mill and water right to one James G. Welch, who, on August 27, 1881, obtained the remaining interest therein, and in 1883, having enlarged the mill race and erected another building, occasionally applied the water, when not used at the flour mill, to a similar wheel which propelled a planer and other wood-working machinery in the new building. October 4, 1880, Welch, Joseph H. Shinn and D. W. Lichtenthaler posted, at a point on the left bank of Anthony Creek, about eleven miles west of the mill site, and filed in the office of the county clerk of said county, a notice subscribed by them to the effect that they claimed and intended to appropriate two thousand inches of the water of said creek, to be diverted at said point and conducted in ditches and flumes to the town of North Powder, to be used for agricultural, mining and

mechanical purposes. Shinn having abandoned his interest in said water right, his associates immediately commenced the construction of the ditch, but on December 16, 1882, Lichtenthaler having conveyed to Coughanour all his interest in the water right, the latter and Welch, in March, 1886, completed the ditch and appropriated the water of said creek to the irrigation of their lands, and on March 6, 1887, Welch also conveyed to Coughanour certain lands which had been thus irrigated, together with his interest in the ditch and water right. On July 17, 1886, Welch had conveyed the town site of North Powder, including the flour mill and its appurtenances, to M. M. Marshall, O. N. Ramsey and Thomas F. Hall, from whom, on October 11, 1892, by mesne conveyances, plaintiff obtained the legal title to the latter property.

In 1888 the then owners of said mill removed therefrom the "home-made" wheel, and in lieu thereof supplied a Flanagan turbine, thirty and one-half inches in diameter, and in 1892 plaintiff remodeled the mill, furnishing an improved roller process for manufacturing flour, and more modern machinery in place of the burrs, and other appliances, so that its capacity was increased from about thirty to about sixty barrels of flour per day. Anthony Creek rises in the Blue Mountains, flows in a southeasterly direction, and empties into the North Powder River at a point about seven miles above the mill site. About the first of April the water of North Powder River and its tributaries commences to rise from melting snow in the valley, and this volume in May and June is largely increased by the melting snow on the mountains, but by the first or middle of July the water begins to subside, and in August or September is usually quite low, remaining in that condition until the fall rains commence, about the first of October. Coughanour owns a large tract of arid land, situated west of the mill site, one

thousand three hundred and sixty acres of which are fenced, two hundred and fifty acres in cultivation, and the entire tract, except about thirty acres, is susceptible of irrigation by his ditch with water from said creek, thereby producing excellent crops of grass, hay, grain, fruit, and vegetables, but without the use of such water this land is nearly valueless. In 1879 Coughanour placed upon his ranch about two hundred head of two-year-old heifers, which in 1892 had increased to about four hundred head of stock, to afford late pasture for which he seeded down to clover and alfalfa about sixty acres of the cultivated land, which was irrigated through the summer and fall, but theretofore, he had raised grain thereon which required irrigation only until about the first of July.

In the summer and fall of 1895, and from July 1 to August 24, 1896, when this suit was commenced, the waters of North Powder River and its tributaries were unusually low, so much so that plaintiff was unable to operate its mill to the full capacity, and, claiming that the diminution of its motive power was attributable to defendant's diversion, this suit was instituted for relief. Plaintiff alleged that its grantors and predecessors in interest made a prior appropriation of the water of North Powder River to the extent of one thousand two hundred inches, miners' measurement, under six inches of pressure, which quantity, since the completion of the mill, had been constantly used in its operation; and that defendants unlawfully diverted five hundred inches of water, miners' measurement, from Anthony Creek, above the head of the race-way of its mill, whereby the operation thereof had been retarded at the time and in the manner indicated, to its damage in the sum of \$1,000. The issues having been joined, a trial was had, and from the evidence taken thereat the Court found the facts, in substance as herein detailed, and also that plaintiff was

entitled to one thousand inches of water, to be measured at the head of the mill-race, under six inches of pressure, and that it recover the sum of \$200 as damages, and thereupon gave a decree in accordance with such findings, and also perpetually enjoined Coughanour and his agent, Duff, their servants, etc., from depriving plaintiff of any part of the water so awarded to it, from which decree defendants appeal.

It is contended by defendants' counsel that Welch, being the sole owner in fee of certain lands and of the flour mill property with its appurtenant right of prior appropriation, could change the point of diversion from the race-way on North Powder River to the bank of Anthony Creek, where the notice was posted, and could also alter the use of the water from the operation of a flour mill to the irrigation of arid land; that their client, at Welch's request, and upon his representation that he owned the water right, and that the ditch in question could be enlarged to any size, purchased from Lichtenthaler certain real property and an undivided one-half interest in the ditch and water right, and thereafter also purchased from Welch certain other real property, to the irrigation of which the waters from said creek had been appropriated, obtaining from the latter a deed therefor, which also conveyed the remaining interest in the ditch and water right without any reservation whatever; and that Welch, in irrigating said land with water diverted from the creek, thereby created an advantage thereto to the detriment of his mill property, and upon conveying such lands to Coughanour without reservation the latter took them as they openly and visibly appeared at the time the deed was executed, thereby obtaining the permanent right to divert the waters of Anthony Creek and appropriate the same to the irrigation of his lands.

The documentary evidence, introduced at the trial,

shows that from August 27, 1881, to July 17, 1886, Welch was the sole owner in fee of the flour mill and its appurtenant water right, during which time the ditch was constructed by himself and Coughanour, the water diverted from Anthony Creek and appropriated to the lands owned in severalty by them, and when the latter succeeded to Welch's interest in the arid lands, ditch and water right, on May 6, 1887, no reservation was made in the conveyance evidencing the transfer of the title. Welch, on November 3, 1882, wrote Coughanour that Lichtenthaler, having become discouraged at the poor progress made in the construction of the ditch, upon which they had worked two years, would, in consideration of the payment of \$1,860, relinquish his interest in six hundred and forty acres of public land upon which he had a filing under the Desert Land Act of the United States, so as to permit the purchaser to make a filing thereon, and also convey two hundred and eighty acres of State land and his interest in the ditch and water right; that Lichtenthaler had paid \$400 and owed \$500 on account of the construction of the ditch, which latter sum would have to be paid by the purchaser in addition to the consideration so demanded. Welch also enclosed a plat of the lands in question, the character and value of which he carefully described, and, in order to induce Coughanour to effect a purchase of said premises and water right, wrote him as follows: "The ditch is to carry six hundred inches. There is a part of this land that don't need water only in dry seasons, but the water can be sold to good advantage. It covers twenty thousand acres, and I own the water right on account of the mill. The ditch can be enlarged to any size. The ditch is considered good property by every one in this county. This will make one of the best wheat farms in this valley. * * * This is

money invested that there is no chances to take." Mr. Coughanour, as a witness in his own behalf, says, in substance, that he inferred from Welch's letter that there would never be any trouble in reference to the water, from the fact that the latter owned the first right, and was willing to furnish water for irrigating at the expense of his own interests; that, relying upon the representations contained in the letter, he, on December 16, 1882, purchased Lichtenthaler's interest, and that if he had known that no water could have been obtained, he would never have invested one dollar in these lands, which were valueless without irrigation.

James G. Welch, appearing as a witness for defendants, testified that his intention, which existed at the time and prompted the construction of the ditch, was to raise wheat to be ground in and thereby to keep his mill in operation, and to furnish water to irrigate lots in the town site of North Powder, of which he was the owner. Upon this subject, he testified as follows: Q. "What object did you have in constructing that ditch?" A. "I constructed it to cover some desert lands. Lichtenthaler took up one section, and I took up the adjoining section; and I had land below—State lands. I took it out for the purpose of raising wheat for the mill; pretty good wheat land." * * * Q. "And your purpose in making the appropriation of water, and diverting that water there and carrying it over to this land, was to irrigate the land so as to raise wheat on it?" A. "Yes, sir; good wheat land as there is in Powder River Valley." Q. "That is, good wheat land provided it is irrigated properly?" A. "Yes, sir; good wheat land." Q. "And you wanted to raise wheat for your mill?" A. "Yes, sir." * * * Q. "Why did you want to raise wheat?" A. "Because I couldn't get wheat to run the mill. We didn't raise wheat enough there. I had

been getting my wheat from Grand Ronde Valley, generally, and when the railroad was completed I couldn't get wheat from Grand Ronde Valley without paying more than it was worth." * * *

Q. "When you concluded to construct this irrigating ditch did you take into consideration the effect it would have upon your water power at the mill?" A. "Yes, sir; I did."

Q. "Explain the matter now as you remember it."

A. "The way I explain it is that I wanted to raise wheat to run the mill. The mill was no use without wheat. And then I expected to put in an engine to run the mill in winter. It always froze up on me. I conceded the same to Lichtenthaler; he wouldn't take hold of it until I did. That is why I conceded the same to Coughanour." * * *

Q. "What, if anything, did the town site of North Powder have to do with the ditch?" A. "It had a good deal to do with it."

Q. "Explain what it had to do with it." A. "It was of more importance to me than the mill and the whole business at that time; that is, the balance of the business. I expected to sell lots and furnish water to irrigate the lots. I had land there, considerable of it; besides, I had a half section of land that the ditch emptied out on at that time."

In the light of this testimony we will examine the legal principle applicable to the construction of the deed evidencing the transfer of the land and water right to Coughanour, with a view of ascertaining if possible the intention of the parties. When the intention of the parties to a deed is not discoverable from an inspection of the instrument, and proof of actual knowledge of the contracting parties with reference to the physical condition of the premises at the time of sale is unobtainable, the rule for determining such intention is to

invoke the presumption that the grantor intended to convey and the grantee to take the premises as they openly and visibly appeared at the time the sale thereof was consummated: *Knapp v. White*, 23 Conn. 529; *Cary v. Daniels*, 8 Metcalf 466 (41 Am. Dec. 532); *Dunklee v. Wilton R. R. Co.*, 24 N. H. 489; *Gillis v. Nelson*, 16 La. Ann. 275; *Vermont Central R. R. Co. v. Hills*, 23 Vt. 681. Mr. Devlin, in his work on Deeds (Vol. 2, § 841), illustrating this principle, says: "If by an artificial arrangement an owner of land has created an advantage for one part of the land to the detriment of the other, the holders of the two parts upon a severance of the ownership take them as they openly and visibly appeared at the time of the deed." To the same effect see also *Nicholas v. Chamberlain*, 3 Croke, 121; *United States v. Appleton*, 1 Sumner, 492; *New Ipswich Factory v. Batchelder*, 3 N. H. 190 (14 Am. Dec. 346); *Seymour v. Lewis*, 13 N. J. E. 439 (78 Am. Dec. 108); *Lapman v. Milks*, 21 N. Y. 505; *Curtiss v. Ayrault*, 47 N. Y. 73; *Heartt v. Kruger*, 121 N. Y. 386 (9 L. R. A. 135, 18 Am. St. Rep. 829, 24 N. E. 841); *Cave v. Crafts*, 53 Cal. 135; *Farmer v. Ukiah Water Co.*, 56 Cal. 11. In *Simmons v. Cloonan*, 47 N. Y. 3, it is held that the presumption of law, that when the owner of the whole tenement divides the same and conveys a portion the parties contract with reference to the visible physical condition of the property at the time, may be repelled by actual knowledge on the part of the contracting parties of facts which negative any deduction to be drawn from the apparent condition. The proof of actual knowledge of the contracting parties in reference to the physical condition of the premises conveyed is admissible only when the deed fails to express the intention in this respect, and hence, while such evidence repels the presumption which the law invokes, it does not tend to contradict the terms of a

written instrument, because they are not expressed therein: *Wilson v. Cochran*, 86 Am. Dec. 574.

It will be remembered that Welch's letter describes the land lying under the ditch as being well adapted to the growth of wheat, and his testimony shows that his desire to keep the mill in operation, and his inability to procure a supply of this cereal elsewhere, furnished the intent, and prompted him to seek the cultivation thereof, and as a means to that end it became necessary to construct the ditch in question. True, he states in his letter that the water not needed to irrigate the land which he owned, and that which he wanted Coughanour to purchase could be sold, but this must be understood to mean that the surplus could be supplied to others for irrigating land for the raising of wheat. Welch may have intended to furnish water by the ditch in question to irrigate town lots at North Powder which he expected to sell, but it is not claimed that defendants' land forms any part of the town site, and such being the case a fair construction of Welch's letter, as illustrated by his testimony, shows that the right intended to be conveyed to Coughanour was limited to the use of water to irrigate land for the growth of wheat. The irrigation season for wheat, as appears by the testimony, terminates about the first of July, prior to which there is usually an abundance of water flowing in North Powder River to supply all reasonable demands for that purpose, and to furnish sufficient quantity to operate the mill, and, this being so, the advantage conferred upon the arid land by the construction of the ditch was no detriment to the mill property, and hence the rule invoked has no application to the case at bar.

Defendants' counsel maintain that the evidence conclusively shows that prior to July 17, 1886, when Welch conveyed the town site of North Powder to Marshall,

Ramsey and Hall, the water right appurtenant to the flour mill had been severed therefrom, and the water, which from time immemorial flowed in the channel of North Powder River past the point where now is located the head gate of the mill race, had been diverted from Anthony Creek, and appropriated to the irrigation of arid land which was owned and claimed by Welch and Coughanour, and that the water thus diverted and appropriated became a part of said lands as appurtenant thereto; and, this being so, the court erred in refusing to grant their motion for a nonsuit. The evidence shows that on October 21, 1880, when Welch claims to have made the diversion by posting the notice, he owned only an undivided three-fourths interest in the flour mill, the remaining part being owned by one S. B. Baisley, from whom Welch obtained the title August 27, 1881. But, assuming that Welch, by this conveyance, obtained the ratification of his co-tenant in the impairment of the motive power of their mill, let us examine the deeds evidencing the several transfers by which Coughanour claims to have succeeded to the interest of his associates, and thereby acquired the prior right of diversion. The record before us contains no deed from Welch to Lichtenthaler conveying any interest in the ditch and water right, and Welch, in his letter to Coughanour, in speaking of the latter's purchase of Lichtenthaler's interest in said lands, says: "If you buy, I will give you a deed to a half of the ditch, if you pay half of the expense of what is back, which is \$500," thus showing that, notwithstanding Lichtenthaler was interested with him in the ditch, Welch considered that he was the sole owner of the water right. True, Lichtenthaler, on December 16, 1882, executed to Coughanour a quitclaim deed to all his interest in the ditch, but the record fails to show that he had any interest therein, or that Welch

kept the promise contained in his letter, to execute to Coughanour a deed evidencing the transfer of Lichten-thaler's interest in the ditch; so that the first conveyance from Welch, in respect to any water privilege, was that of July 17, 1886, to Marshall, Ramsey and Hall, of his interest in the town site, grist mill, planer, etc., which, having been executed more than nine months prior to Coughanour's deed, it is quite evident that the court committed no error in denying said motion.

It is insisted by defendants' counsel that plaintiff is estopped by the conduct of Welch, its predecessor in interest, from interfering with or objecting to defendants' diverting the waters of said creek, not exceeding five hundred inches, miners' measurement, under six inches of pressure. If Coughanour, relying upon Welch's representations, materially aided the latter in constructing the ditch, whereby the water was diverted and appropriated for a particular purpose, the parol license thus granted, having been fully executed, would be irrevocable, in view of which the better reason in our judgment supports the theory that a court of equity would enjoin the licenser from interfering with the free exercise of the right he had thereby conferred: *Washburn*, Easem. *560; *Yunker v. Nichols*, 1 Colo. 551; *Schilling v. Rominger*, 4 Colo. 100; *De Graffenried v. Savage*, 9 Colo. App. 131 (47 Pac. 902); *Curtis v. La Grande Water Co.*, 20 Or. 34 (10 L. R. A. 404, 23 Pac. 808); *McBroom v. Thompson*, 25 Or. 559 (42 Am. St. Rep. 806, 37 Pac. 57); *Garrett v. Bishop*, 27 Or. 349 (41 Pac. 10). See also extended note to the case of *Lawrence v. Springer*, 31 Am. St. Rep. 702 (24 Atl. 933). If plaintiff mill company succeeded to Welch's interest with knowledge of the execution of his parol license, a court of equity would probably enjoin it from interfering with the exercise of such right. But, if this be true, plaintiff is not attempting to interfere with Coughanour's irriga-

tion of wheat land, and as this was the object for which Welch gave the parol license, it is evident that plaintiff is not estopped by the conduct of its predecessor in interest.

It is claimed that Coughanour by adverse user obtained a title to the water he diverted and appropriated. The evidence shows that on March 2, 1886, he applied the water to a beneficial use, but as there was no scarcity of that commodity until 1895, how can it be said that there was a hostile invasion of plaintiff's right prior thereto? Plaintiff having the right of prior appropriation of sufficient water to operate its mill, was not injured by any other diversion, so long as its demands were supplied: *Wimer v. Simmons*, 27 Or. 1 (50 Am. St. Rep. 685, 39 Pac. 6); *Anaheim Water Co. v. Semi-Tropic Water Co.*, 64 Cal. 185 (30 Pac. 623). The right of prior appropriation is incompatible with the doctrine of riparian proprietorship (Pomeroy on Riparian Rights, § 132; Kinney on Irrigation, § 272), and as Tartar, plaintiff's predecessor in interest, was the first settler upon the banks of that part of North Powder River, he had the privilege of making a prior and superior appropriation of its waters, or he could insist upon having the stream flow uninterruptedly in its channel through his land, subject, however, to the natural use of the water by upper riparian proprietors, and also to a reasonable use thereof by them in irrigating their lands, if the volume of water was sufficient to supply the natural wants of the different proprietors; but, having elected to divert the water, he could not thereafter stand upon his strict common law rights as a riparian proprietor: *Low v. Schaffer*, 24 Or. 239 (33 Pac. 678).

This being so, and plaintiff's demands having been supplied, it would seem that it could not enjoin Coughanour from diverting water for irrigation until there had

been some interruption of its use amounting to a deprivation of its right, and to hold that Coughanour, in the meantime, might obtain by adverse user a right to the water so diverted would be equivalent to conceding that plaintiff without redress might be deprived of a valuable property right by means of an invasion of which it was not conscious. Plaintiff never having been injured by Coughanour's diversion until 1895, the statute of limitations had not barred its right to equitable relief when this suit was instituted. ✓

It is conceded by defendant's counsel that Coughanour permitted sufficient water to pass the head gate of his ditch to supply plaintiff's demand, and, after having done so, the water was diverted and appropriated by others before it reached plaintiff's mill race, and that, having alleged these facts as a defense, the court erred in sustaining a demurrer to that part of the answer. The point contended for assumes that there is a defect of parties defendant, which is not apparent from an inspection of the complaint, to correct which an answer is the only available pleading, and, being in the nature of a common law plea in abatement, it was incumbent upon defendant, if it be assumed that the court in one suit will settle the whole controversy, to name the parties whom he claims are necessary to a proper adjudication of the question, thus affording the plaintiff "a better writ," and ask that they be brought in; but, having failed to do so, defendant waived his right, if it existed, and hence there was no error in sustaining the demurrer: 1 Chitty, Pleading, *446; Hawes, Parties to Actions, § 100; Bliss, Code Pleading (3 ed.), § 411; 1 Enc. Pl. & Prac. 14, 17 and 25.

It is also maintained that Welch and his grantees had no right to increase the appropriation of water in the operation of the mill after Coughanour acquired a right

to divert and appropriate the water from Anthony Creek. The testimony on this branch of the case is very conflicting, Welch stating that prior to 1883 it required only three hundred inches of water, miners' measurement, to operate the flour mill successfully, but in that year, having placed a planer, shingle cutter and other machinery in a building below the mill, he was obliged to enlarge the race so as to make it capable of conducting five hundred inches of water, in order to propel the increased burden, and that the size of the mill race and its capacity to conduct water are double what they were when plaintiff obtained a title to the property; while the testimony of plaintiff's witnesses tends to show that, notwithstanding the race had been widened from a point about one-half a mile above down to the mill, and the dirt taken therefrom used to raise the embankment, so that the water in the race-way and penstock was deepened from nineteen to twenty feet, thereby permitting the current to pass freely under the ice, keeping the mill in operation in the winter, the gate at the head of the race is not as large as it was when first constructed; that it did not require so much water to operate the Flanagan turbine and the roller process and accompanying machinery as the "home made" wheel demanded to propel the burrs and old appliances, and that the increase in the mill's daily output is due to modern machinery and improved methods of manufacturing flour, and not to any increase in the volume of water or amount of power. The court found that it required one thousand inches of water properly to operate the old, and this quantity was necessary for the new wheel, and we think a preponderance of the testimony warrants this finding, and that the volume of water flowing through the head gate has not been increased. But if it be admitted that the quantity of water used at the mill is

greater than the original appropriation, Coughanour was not injured thereby, when it is remembered that it was originally intended that his appropriation should be limited to the irrigation of wheat land only. For these reasons, it follows that the decree is affirmed.

AFFIRMED.

Argued 18 May; decided 14 September, 1898.

STATE EX REL. v. COMPSON.

[54 Pac. 349.]

CONSTRUCTION OF CONSTITUTION—APPOINTING POWER.—An act creating an office and providing that the incumbent thereof shall be elected by the legislature is not unconstitutional as an invasion of the Governor's prerogatives. The power to fill an office may be exercised by either the executive or the legislature, in the absence of a constitutional prohibition.

CONSTITUTIONAL CONSTRUCTION.—The Constitution of Oregon, so far as it relates to the legislature, is a limitation rather than a grant of power, and that body may exercise any of the powers of sovereignty not expressly withheld: *Biggs v. McBride*, 17 Or. 640, and *Eddy v. Kineaid*, 28 Or. 537, cited and applied.

TENURE OF PUBLIC OFFICE—VACANCY—CONSTITUTION.—In considering the tenure of public officials, the provisions of the Constitution of Oregon, Article XV, §§ 1 and 2, must be read together, and they mean that, while no office can be created with a tenure of over four years, yet the incumbent may hold longer than that by reason of a failure to provide his successor. No vacancy ensues by such failure.

CONSTITUTIONAL CONSTRUCTION—PUBLIC OFFICERS.—The meaning of the expression "All officers" used in the Constitution of Oregon, Article XV, § 1, is not limited to those officers named or provided for in that document, or to such as are chosen by popular election, nor is it limited at all except as to members of the legislature.

IDEM.—The word "elected" in the Constitution of Oregon, Article XV, § 1, providing that public officers shall remain in office until their successors are "elected and qualified" does not refer solely to a selection by the people, but includes a choice by the legislative assembly.

HOLDING OVER—VACANCY IN OFFICE.—Mere failure of the legislature for any length of time to appoint successors to officers who are to hold office until their successors are elected and qualified, does not create a vacancy which the Governor may fill by appointment.

VACANCY—FILING BOND.—Failure of officers holding over till their successors are elected and qualified to renew their bonds does not, in the absence of a provision requiring such renewal, make a vacancy to be filled by the Governor.

APPOINTMENT OF RAILROAD COMMISSIONER.—No vacancy which the Governor is authorized to fill exists in the office of railroad commissioner after the expiration of the time fixed by law for such commissioners to hold office. The incumbent simply remains in office until his successor is elected and qualified.

From Multnomah: E. D. SHATTUCK, Judge.

This is an action maintained in the name of the State, upon the relation of Albert I. Wagner, to oust H. B. Compson from a public office. It is alleged in the complaint that on February 17, 1893, the legislative assembly chose, for the term of two years, I. A. Macrum, J. B. Eddy, and H. B. Compson, as railroad commissioners, who duly qualified as such, and entered on the discharge of their duties; that said assembly, at its biennial session of 1895, neglected to appoint any successors to said commissioners, who, claiming to hold over, continued to perform the duties of said office and to take the emoluments pertaining thereto; that the legislative assembly, in 1897, again failed to choose any railroad commissioners, whereupon Macrum and Eddy, still claiming to hold over, took and subscribed the oath of office, and executed bonds for the faithful performance of their duties, but Compson neglected to retake the oath of office or to enter into another official undertaking; that, during a recess of the legislature, a vacancy occurred in the board by reason of the expiration of Compson's term of office, whereupon the Governor, on August 20, 1897, appointed the relator, Albert I. Wagner, a railroad commissioner, who duly qualified as such, and at the time of his appointment possessed and now enjoys such qualifications as render him eligible to the office; that prior to the commencement of

this action the relator demanded the possession of said office from defendant, who declined and still refuses to comply with such demand, but usurped the said office, which he unlawfully holds, to relator's damage, to the injury of the public, and contrary to the Constitution and laws of the State of Oregon. A demurrer to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action, having been sustained, the relator declined to amend the pleading, whereupon the action was dismissed, and he appeals.

AFFIRMED.

For appellant there was a brief over the names of *Paxton, Beach & Simon*, and *Cicero M. Idleman*, with an oral argument by *Messrs. Ossian Franklin Paxton* and *Cicero Milton Idleman*.

For respondent there was a brief and an oral argument by *Mr. Julius C. Moreland*.

PER CURIAM. The contention in behalf of the relator is, first, that the act creating the Board of Railroad Commissioners (Hill's Ann. Laws, § 4002 *et seq.*) is unconstitutional, in so far as it attempts to vest in the legislative assembly the power of appointing the incumbents, and that the assumption of that authority by the law-making department trenches upon the prerogative of the Governor, upon whom the duty of filling vacancies in State offices devolves. But this identical question has twice been held adversely to relator's contention by this court, and can therefore no longer be regarded as an open one: *Biggs v. McBride*, 17 Or. 640 (21 Pac. 878, 5 L. R. A. 115); *Eddy v. Kincaid*, 28 Or. 537 (41 Pac. 156, 655). The effect of these decisions is that the fundamental law of the State, so far as it relates to the Legis-

lature, is a limitation and not a grant of power, and, this being so, the legislative assembly may exercise any of the powers of sovereignty not prohibited, and that the appointment of persons to office is within the domain of the law-making department (*People v. Hurlbut*, 24 Mich. 44, 9 Am. Rep. 103); or, as is said by Mr. Chief Justice MURRAY in *People v. Langdon*, 8 Cal. 1: "The power to fill an office is political, and this power is exercised in common by the legislatures, the governors, and other executive officers of every State in the Union, unless it has been expressly withdrawn by the organic law of the State." Mr. Justice LORD, in *State ex rel. v. George*, 22 Or. 142 (29 Am. St. Rep. 586, 29 Pac. 356), commenting upon the powers of the several departments of state, says: "While our constitution separates the powers of government into three distinct departments, and prohibits any of them from exercising any powers confided to the other, it does not undertake to declare what shall be considered legislative, executive, or judicial acts."

Notwithstanding some contrariety of judicial utterance in relation to the power of a legislative body to appoint persons to office may be found to exist, we think, under a constitution like ours, which does not prohibit such appointments, the rule announced in *Biggs v. McBride*, 17 Or. 640 (21 Pac. 878, 5 L. R. A. 115), is founded in reason and unassailable upon principle. The following cases support this doctrine: *Board of Revenue v. Barber*, 53 Ala. 589; *People v. Osborne*, 7 Colo. 605 (4 Pac. 1074); *State v. Covington*, 29 Ohio St. 102; *People v. Draper*, 15 N. Y. 532; *People v. Batchelor*, 22 N. Y. 128; *People v. Woodruff*, 32 N. Y. 355; *People v. Pinckney*, 32 N. Y. 377; *Sturgis v. Spofford*, 45 N. Y. 446; *People v. Langdon*, 8 Cal. 1; *People v. Hurlbut*, 24 Mich. 44 (9 Am. Rep. 103); *State v. Irwin*, 5 Nev. 111; *State v. Swift*, 11 Nev. 128; *Mayor, etc., of Baltimore v. State*, 15 Md.

376 (74 Am. Dec. 572); *Bridges v. Shallcross*, 6 W. Va. 562; *Baker v. Kirk*, 33 Ind. 517; *State ex rel. v. Harrison*, 113 Ind. 434 (3 Am. St. Rep. 663, 16 N. E. 384); *Thorpe v. Rutland R. R. Co.*, 27 Vt. 140 (62 Am. Dec. 625). See, also, on this subject, the very able dissenting opinion of Mr. Chief Justice ELLIOTT, in *State ex rel. v. Hyde*, 121 Ind. 20 (22 N. E. 644).

It is next maintained that, at the expiration of four years from the date of Compson's appointment, the office became vacant, under the provision of the constitution, Article XV, § 2, which declares that "the legislative assembly shall not create any office, the tenure of which shall be longer than four years." Section 2 of the Act creating the Board of Railroad Commissioners and prescribing its duties reads as follows: "Said commissioners constituting said board shall be chosen biennially by the Legislative Assembly of the State of Oregon, and shall hold their office for and during the term of two years and until their successors are elected and qualified as in this act provided, and if a vacancy occurs by resignation, death, or otherwise, the Governor shall appoint a commissioner to fill such vacancy for the residue of the term:" Hill's Ann. Laws, § 4003. This act manifestly creates an office the term or tenure of which is two years, with a provision that the incumbent shall hold the office until his successor is elected and qualified. But the contention of relator is that the words "until his successor is elected and qualified" may, in consequence of a contingency, serve to prolong the incumbent's term of office, in which case the extension resulting therefrom is as much a part of the entire term as any portion of the period specified in the act, and that, as a consequence, it is violative of the constitution for anyone to hold an office created by the legislative assembly more than four years by virtue of one election or appointment. In other

words, the contention is that the provision that the incumbent shall hold over until his successor is elected and qualified cannot extend his right, under any circumstances, more than four years; that Compson could legally hold the office by virtue of his appointment for the fixed term of two years, and, in consequence of the failure of the legislative assembly of 1895 to appoint his successor, two years longer, but at the expiration of four years the office became vacant under the constitution, notwithstanding the provision that he should hold until his successor is elected and qualified. The logic of the argument is that the legislature may create an office the term of which shall be four years, and may reserve to itself the right to select the incumbent; but it is inhibited, as between the officer and the appointing power, from providing that the incumbent of such office shall hold after the expiration of that time, or until his successor is elected and qualified. This position is probably sound, unless Section 1 of Article XV of the Constitution, which provides that "All officers, except members of the legislative assembly, shall hold their offices until their successors are elected and qualified," applies to the office of railroad commissioner.

The law seems to be settled that, where the duration of an official term is limited by the constitution, the office becomes vacant at the expiration of that term, even though the legislature has provided that the incumbent shall hold until his successor is duly qualified: 19 Am. & Eng. Enc. Law (1 ed.), 433; *State v. Howe*, 25 Ohio St. 588 (18 Am. Rep. 321); *State ex rel. v. Brewster*, 44 Ohio St. 589 (9 N. E. 849). But when the constitution in one clause inhibits the legislature from creating an office the tenure of which shall be longer than a specified number of years, and in another provides that such officer shall hold until his successor is qualified, the two

provisions are to be read and interpreted together, and the result is that the legislature is inhibited from creating an office the tenure of which shall be for a longer period than the time specified in the constitution; but if, at the expiration of that period, no successor has been elected and qualified, the incumbent holds over by the paramount right of tenure, which the constitution supplies, until he is superseded by a qualified successor, appointed or elected under some provision of law, and a failure of the particular authority to elect his successor does not create a vacancy in the office: ' *State ex rel. v. Harrison*, 113 Ind. 434 (3 Am. St. Rep. 663, 16 N. E. 384). This position is practically undisputed by counsel for the relator, and it is substantially conceded that, if Section 1 of Article XV of the Constitution applies to officers appointed by the legislature, there was no vacancy in the office of railroad commissioner at the time of Wagner's appointment, and as a consequence he has no right to the office. But their contention is that the constitutional provision under which officers are allowed to hold over until their successors are elected and qualified has no application to the office of railroad commissioner, for the following reasons: First, because it was intended to and does apply to the incumbents of such offices only as are created by or provided for in the constitution itself; and, second, to such offices as are elected by the electoral body at large, and not by the legislative assembly. But this construction, it seems to us, gives to the language of the section a restricted meaning authorized neither by the words nor the context. It does not say that the officers named or provided for in the constitution, or those elected by the people, shall hold until their successors are elected and qualified, but that all officers, except members of the legislature, shall do so. Its language is plain, simple, unam-

biguous, and easily understood. That a railroad commissioner is an officer is undisputed, and it seems to us that he must necessarily come within the terms of this section of the constitution.

Attention is specially directed to the use of the words "elected and qualified" in the section referred to, and it is insisted that as so used they refer solely to the selection by the people, and references are made to many instances in which the terms "election" and "appointment" are used in the various provisions of the constitution. The word "election," in the strict sense, undoubtedly means the choice of an officer in the exercise of which all the qualified electors have an opportunity to participate, while the word "appointment" is understood to mean the selection by one or more persons, who have been commissioned for that purpose, of another, who, by virtue of the choice, represents or may exercise some authority over the persons delegating the power to make the appointment: *Throop*, Pub. Off. § 84; *Speed v. Crawford*, 3 Metcalf (Ky.), 207; *State v. McCollister*, 11 Ohio, 46; *Gosman v. State*, 106 Ind. 203 (6 N. E. 349); *Kimberlin v. State ex rel.* 130 Ind. 120 (30 Am. St. Rep. 208, 14 L. R. A. 858, 29 N. E. 773); *McGruder v. Swan*, 25 Md. 173; *State v. Irwin*, 5 Nev. 111; *Conger v. Gilmer*, 32 Cal. 75; *Wickersham v. Brittan*, 93 Cal. 34 (15 L. R. A. 106, 28 Pac. 792, and 29 Pac. 51); *Carpenter v. People*, 8 Colo. 116 (5 Pac. 828). In *People v. Langdon*, 8 Cal. 1, it was insisted that the words "elected" and "appointed," as used in a section of the California Constitution, were not equivalent expressions of the meaning intended to be imparted by the framers of that instrument; but Mr. Chief Justice MURRAY, in answering the argument, says: "Much stress is laid upon the word 'appointed,' as used in this section. This is mere hypercriticism. The former decisions of this court have substantially set-

tled this point. The word 'appoint' was probably used as a more comprehensive term to convey the idea of a mode of constituting or designating an officer, whether by election or otherwise. In fact, the words 'elect' and 'appoint' seem to have been regarded as synonymous by the convention." The word "elect" simply means to pick out, to select from among a number, or to make choice of, and is synonymous with the words "choose," "prefer," "select," and it was evidently used in this sense in the constitution.

While the words "elect" and "appoint" are not ordinarily synonymous, we think a careful examination of the language of our constitution will show that, in some instances, the framers of that instrument have used them as such. Thus, it is provided in Constitution, Article II, § 15, that "in all elections by the legislative assembly, or by either branch thereof, votes shall be given openly or *viva voce*," etc. It might seem, at first view, that the word "elections," as here used, was limited to the choice of officers of the house or senate by the members thereof, but if this be so, Section 30, Article IV, which reads: "No senator or representative shall, during the time for which he may have been elected, be eligible to any office the election to which is vested in the legislative assembly," etc.,—would prevent the organization of either branch of the legislature, thus showing that under the definition hereinbefore given the word "elections" in the first clause evidently means "appointment" only. So, too, the legislative assembly is authorized to "elect" a Governor from the candidates who have received an equal and the highest number of votes cast therefor (Section 5, Article V), thereby indicating that the phrase "to elect," as used in this section of the organic act, undoubtedly means "to appoint."

Other references might be made, but these are sufficient to show that the word "election" is not used in the constitution to designate a choice by the electoral body at large, but that a selection or choice made by the legislative assembly is as much an election as a choice by the people. This is the construction given to a similar clause in the Constitution of Indiana by the supreme court of that state in the case of *State ex rel. v. Harrison*, 113 Ind. 343 (3 Am. St. Rep. 663, 16 N. E. 384), and the argument of Mr. Justice MITCHELL in that case is, in our opinion, unanswerable. The provisions of the Constitution of Indiana, prohibiting the creation of an office by the legislature, the tenure of which shall be longer than four years, and permitting an officer to hold over until his successor is elected and qualified, are identical with ours ; and the decision in the case referred to is a complete answer to every position open to the relator in this case, except that the constitutional provision under which officers are empowered to hold over until their successors are elected and qualified has application solely to such officers as are provided for in the constitution. In this respect only the Indiana Constitution differs from ours. It declares that " whenever it is provided in the constitution, or in any law which may be hereafter passed, that any officer other than a member of the general assembly shall hold his office for any given term, the same shall be construed to mean that such officer shall hold his office for such term and until his successor shall be elected and qualified " (Article XV, Section 3), while ours provides that " all officers, " etc., which, it seems to us, is practically the same thing.

Again, it is insisted that the constitutional provision that officers shall hold until their successors are elected and qualified, and the provision of the act creating the Board of Railroad Commissioners to the same effect, were

designed only to cover a possible interregnum between the expiration of a fixed term and the qualification of the incumbent's successor, and that they do not contemplate an indefinite holding, and, therefore, the Governor had a right to assume there was a vacancy in the office of railroad commissioner, and to appoint Compson's successor. But the vice of this position lies in the fact that the Governor is only authorized to make an appointment in case of a vacancy in the office, and there can be no vacancy as long as Compson has a legal right to continue in possession thereof, and is qualified to exercise its powers (*Johnston v. Wilson*, 2 N. H. 202 [9 Am. Dec. 50]; *People v. Whitman*, 10 Cal. 38; *Commonwealth v. Hanley*, 9 Pa. St. 513; *Gosman v. State*, 106 Ind. 203 [6 N. E. 349]; *Ex parte Lawhorne*, 18 Grat. 85; *Johnson v. Mann*, 77 Va. 265); and, as we have seen, he has the right, under both the Constitution and the statute, to continue in possession of the office until his successor is elected and qualified in the manner provided in the act creating the office.

It is also maintained that the sureties on Compson's official bond are not liable for defalcations occurring after the expiration of the two-years' term for which he was elected, and that by reason of his failure to renew the undertaking there was such a vacancy in his office as would enable the Governor to fill it by appointment. But our attention has not been called to any provision of law requiring an officer who holds over after the expiration of his term to renew his official bond, or declaring that the office shall become vacant in case he fails to do so, and, without such a provision, it is clear that the Governor could not declare a forfeiture or oust Compson from the office to which he had been appointed by the legislative assembly. The Governor could appoint only in case of a vacancy in an office for a failure to renew the

bond, only by virtue of some provision of law to that effect. As to whether a railroad commissioner should be required to execute a bond at all was a legislative question, and if it saw proper to suffer him to hold over after the expiration of his prescribed term, until his successor should be appointed and qualified, without making any provisions requiring him to renew his bond, or declaring the office vacant in case he should fail to do so, it is manifest that no vacancy could occur, although it may be, as a matter of law, that the sureties on his official bond are bound only for defalcations occurring during the original term for which he was chosen. No error having been committed in sustaining the demurrer, it follows that the judgment is affirmed.

AFFIRMED.

Decided 24 October, 1898.

PETTEYS v. COMER.

[54 Pac. 818.]

1. **MORTGAGE FORECLOSURE—PERSONAL JUDGMENT.**—An allegation in a complaint for a mortgage foreclosure that the holder of the property purchased it subsequent to the execution of the mortgage and assumed its payment is sufficient to support a personal decree against him by default.*
2. **APPEAL—PARTIES.**—A case will not be remanded on appeal for the failure of the court below to take special action upon an application to bring in a new party, where, from the respective averments of the parties, it is apparent that he was neither a necessary nor a proper party to the suit.

From Tillamook: HENRY H. HEWITT, Judge.

*NOTE.—On the subject of the personal liability of the grantee of mortgaged premises, where the conveyance recites an agreement to assume and pay such encumbrance, see *Miles v. Miles*, 6 Or. 206 (25 Am. Rep. 522), *Walker v. Goldsmith*, 7 Or. 162, and *Farmer's National Bank v. Gates*, 33 Or. 388. After the decision herein, the point was raised and sustained that a grantee of mortgaged premises who agrees to pay the encumbrance is not liable unless his immediate grantor was so bound. *Young Men's Association v. Croft*, post ———

—REPORTER.

Bill for a foreclosure by M. B. Petteys against J. C. Comer and wife, the Bay City Co-operative Co. and others. There was a decree for plaintiff, and the company appeals.

AFFIRMED.

For appellant there was a brief over the name of *Handley & Handley*.

For J. C. Comer there was an oral argument by *Mr. Thos. B. Handley*.

For respondent there was a brief and an oral argument by *Mr. Thos. H. Tongue*.

MR. CHIEF JUSTICE WOLVERTON delivered the opinion.

This is a suit to foreclose a mortgage executed by the defendants, Comer and wife, in favor of plaintiff. The complaint is in the usual form, and has the following allegation affecting the defendant, the Bay City Co-operative Co., viz.: "That the defendants, James Fuller, Wadhams & Co., and the Bay City Co-operative Co., have, or claim to have, some rights, liens, or claims in or upon the said property, but the same, whatever they may be, were acquired with notice of the plaintiff's mortgage, and are subsequent and subject thereto. That the defendant, the Bay City Co-operative Co., purchased the said property subsequent to the execution of the mortgage set forth in this complaint, and assumed the payment of the note and mortgage." The defendant company interposed a demurrer to the complaint, upon the ground that it does not state facts sufficient to constitute a cause of suit against such defendant. Two entries occur in the record touching the disposal of this demurrer—one showing in effect that it was withdrawn; and the other that said defendant

admitted it to be not well taken, and hence it was overruled. By the terms of each of said orders, said defendant was given leave to answer within the day. Instead of answering, the company applied to the court to have one J. J. McCoy brought in and made a party to the suit. It was averred in the application that said McCoy was the owner of a certain note, for the sum of \$4,000, and a mortgage, executed May 8, 1894, securing the same, upon the property described in the complaint, which said mortgage was recorded in book 1, page 23, Records of Mortgages for said County of Tillamook. The plaintiff filed what was denominated a "reply" to this application, which denied the averments thereof, except the record of the mortgage, and alleged that said mortgage so recorded was one given to J. C. Comer, one of the defendants in said suit; that it had never been assigned to McCoy; and that Comer was still the owner. To this averment there was no denial or other countervailing allegation. The application and reply were filed on August 26, and on the same day the plaintiff filed a motion for a decree as prayed for against defendants, J. C. and Susan Comer and the Bay City Co-operative Co., upon the facts admitted in the pleadings; whereupon the court, on the day following, made and entered a decree foreclosing plaintiff's mortgage in all respects as demanded, which included a personal decree against the said defendant, the Bay City Co-operative Co., for the amount of the note and mortgage sued on.

1. It is insisted by the company that the demurrer to the complaint should have been sustained; but this is not in harmony with the position taken in the lower court, as said defendant either withdrew it or admitted that it was not well taken, and it was consequently overruled *pro forma*. The conflicting journal entries touching it leave us in doubt as to just what was actually done;

but it is immaterial, as the result was, in effect, the same. But, however this may be, the demurrer was properly overruled, if considered upon the merits, as the complaint shows that the company was a necessary as well as a proper party defendant, and that a cause of suit existed against it and in favor of plaintiff. The question whether it was personally liable under the allegations of the complaint might have been tested by motion to strike out; but, as such motion was not interposed, it must be deemed to have been waived. So, the only question remaining is whether the allegation of the complaint touching the matter is sufficient to sustain the decree. We think it is. It states, in substance, that, having purchased the land, the company assumed the payment of the debt secured by the subsisting mortgage upon it. "To assume" means "to undertake; engage; promise:" Black, Law Dict. See, also, *Braman v. Dowse*, 12 Cush. 227. It may be characterized as a defective statement of a good cause of suit, but the averment is undoubtedly sufficient to support the personal decree against the company.

2. There seems to have been no special finding or order by the court below touching the application to have McCoy brought in as a party defendant, and the decree makes no mention of it either directly or indirectly. Considered as an application to bring in a new party,—and this is all that can be claimed for it,—it appears to be not well taken, as, from the respective averments of the parties, it is apparent that McCoy was neither a necessary nor proper party to the suit, so that the court would have been justified in overruling the application directly. We must presume that the court so considered it, or it would not have entered the final decree, with a meritorious application pending. The court granted leave to file an answer during the day, but, instead, the defendant

interposed a frivolous application to bring in a new party, which it may have thought was for the purpose of delay, and, therefore, entered the decree as prayed for. At any rate, it is so apparent there is no merit in the proposition that this court will not send the case back because it does not appear that the court below took special action touching the application to bring in the party named. The decree of the court below will therefore be affirmed.

AFFIRMED.

Argued 18 October; decided 31 October, 1898.

SHEPARD v. SALTZMAN.

[54 Pac. 882.]

ADMINISTRATION EXPENSES—PRIORITY OF MORTGAGE LIEN.—Hill's Ann. Laws, § 1188, authorizing an executor to retain expenses of administration in preference to any claim or charge against testator's estate, does not give him a lien for such expenses prior to a mortgage on testator's land, though the other property is not sufficient to pay such expenses.

From Multnomah: LOYAL B. STEARNS, Judge.

Suit by Robina Shepard against Peter Saltzman, Jr., as executor, to foreclose a mortgage made by the father of defendant in his lifetime. There was a decree for plaintiff.

AFFIRMED.

For appellant there was a brief over the names of *James Gleason* and *Thos. G. Thornton*, with an oral argument by *Mr. Gleason*.

For respondent there was a brief over the name of *Milton W. Smith*, with an oral argument by *Mr. Walter S. Perry*.

MR. CHIEF JUSTICE WOLVERTON delivered the opinion.

This is a suit to foreclose a mortgage upon real property against the personal representative and heirs of the deceased mortgagor. The executor maintains that he has a lien upon the premises for the costs and charges, or expenses, of administering the estate of the deceased, prior and superior in right to the lien of plaintiff's mortgage, there not being sufficient other property of the estate with which to pay such costs and charges. Whether this contention is sound, presents the only question for our consideration. In our view of the matter, this may be resolved by ascertainment of the statutory intent touching the administration of the estates of deceased persons. Section 1183, Hill's Ann. Laws, provides as follows: "The charges and claims which have been allowed, or established by judgment or decree, shall be paid in the following order: (1) Funeral expenses; (2) taxes due the United States; (3) expenses of last sickness; (4) taxes due the state or county or other public corporations therein; (5) debts preferred by the laws of the United States; (6) debts which at the death of the deceased were a lien upon his property or any right or interest therein, according to the priority of their several liens, and (7) debts due employees of decedent for wages, etc.; (8) all other claims against the estate." Section 1184: "The preference given by Subd. 6 of the last section shall only extend to the proceeds of the property upon which the lien exists, and as to such proceeds such debt is to be preferred to any of the classes mentioned in such section, other than the taxes upon such property." This latter section, when read in connection with the former, leads to but one conclusion, which is that the proceeds of the property upon which the lien or liens exist are to be marshaled in a distinct order, with

which section 1183 has but little to do, except as it pertains to the excess above such taxes and liens upon the property. The proceeds of such property are to be applied, first, to the payment of the taxes; second, to the payment of the liens according to their priority; and the balance, if any remains, is to be applied in due course of administration, as prescribed by said section 1183. It is maintained, however, that charges and claims against the estate are to be distinguished from the costs and charges or expenses of administering it, and that, as to the latter, they should have priority over the lien of the mortgage. Section 1178 prescribes that an executor or administrator shall be allowed, in the settlement of his account, all expenses incurred in the care, management, and settlement of the estate, including attorney's fees, and for his services shall receive such compensation as the law allows; and section 1180 prescribes what his compensation shall be. It is these costs and expenses which it is claimed take precedence of the mortgage lien, and they are thought to be regulated by section 1188, which prescribes that the executor or administrator may retain in his hands, in preference to any claim or charge against the estate, the amount of his compensation and the necessary expenses of administration.

It is plain that the charges and claims alluded to in sections 1183 and 1184 are not the same as the compensation of the executor or administrator, and necessary expenses of administration, alluded to in sections 1179, 1180, and 1188, and it may be admitted that these latter expenses take precedence in order of payment over charges and claims against the estate, but it does not follow that they constitute a lien superior in right to a mortgage of the deceased. We find some indication of the legislative intent touching the matter of marshaling the proceeds of the mortgaged property in the provisions of

the statute which empower the county court to dispose of such property, and the manner of procedure necessary to convey an unincumbered title. Section 1163 provides that the court shall order the proceeds of the sale applied, first, to the payment of the proper expenses of the proceeding and sale, and, secondly, to the satisfaction of said debt, and the residue, if any, in due course of administration. This order of distribution is in harmony with our interpretation of sections 1183 and 1184, except that the latter sections do not contemplate a sale of the property under the separate provisions for divesting it of the lien, and hence make no provisions touching the cost of that particular proceeding. It is also analogous to the manner of marshaling the proceeds of sale in a direct proceeding to foreclose the mortgage, which it has been held is cognizable in a court of equity, notwithstanding the estate is in course of administration : *Verdier v. Bigne*, 16 Or. 208 (19 Pac. 64) ; *Teel v. Winston*, 22 Or. 489 (29 Pac. 142).

Looking throughout the purview of all these sections of the statute touching the administration of the estates of deceased persons, it seems clear that it was not intended that the compensation of the executor or administrator, and the expenses of administration, should become a lien superior in right to a mortgage of the deceased, which, from the nature of things, is prior in time ; and that, in any event, only the costs of sale under the special procedure in the county court to divest the lien, and the taxes upon the property, are entitled to precedence in the order of payment. Such has been the holding under analogous statutes in Indiana and California : *Ryker v. Vawter*, 117 Ind. 425 (20 N. E. 294) *Murray's Estate*, 18 Cal. 686. The justice of the rule is manifest. Indeed, a mortgage would be a thing of uncertain and precarious value if the costs and expenses

of administration of the estates of deceased persons were advanced to a prior right of payment over a mortgage lien. Such costs and expenses are so variable and so dependent upon conditions and contingencies, both of time and circumstance, not within the reasonable foresight of business acumen to definitely estimate, as to preclude the idea that the mortgagee contracted with reference to them when he acquired his lien. Ordinarily, the senior lien is prior and superior in right of payment, and there exists no sufficient reason why the general rule should not prevail in a case of the nature of that under consideration. The decree of the court below will be affirmed.

AFFIRMED.

Argued 19 October; decided 31 October, 1898.

ERICKSON v. INMAN.

[54 Pac. 949.]

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|----|----|
| 34 | 44 |
| 41 | 88 |
1. ORDER OPERATING AS AN EQUITABLE ASSIGNMENT.—To give an unaccepted draft or order the effect of an equitable assignment of a fund, it must, by its terms, be drawn upon that fund: *McDaniel v. Maxwell*, 21 Or. 202, approved.
 2. BILLS AND NOTES—ACCEPTANCE.—Under Section 8194, Hill's Ann Laws, no liability is incurred by the verbal acceptance of a bill of exchange, and either drawer or drawee may urge the objection that the acceptance was not written.

From Multnomah: HENRY E. MCGINN, Judge.

Action by Charles Erickson against Inman, Poulson & Co., a corporation. From a judgment for plaintiff, defendant appeals.

AFFIRMED.

For appellant there was a brief over the names of *Cake & Cake*, and *Arthur C. Spencer*, with an oral argument by *Mr. Wm. M. Cake*.

For respondent there was a brief over the name of *Spencer & Malarkey*, with an oral argument by *Mr. Dan J. Malarkey*.

MR. JUSTICE BEAN delivered the opinion of the court.

This is an action to recover a balance of \$316.73 for sawlogs sold and delivered by the plaintiff to the defendant between the first day of December, 1894, and the first day of February, 1895. There is no dispute as to the number or price of the logs sold and delivered, but the defendant claims that its indebtedness to the plaintiff, by reason of such sale, had been extinguished prior to the commencement of the action, on account of its having orally accepted an order drawn on it by the plaintiff, and in favor of one C. W. Nelson, in the following form: "Clatskanie, March 29, 1895. Messrs. Inman, Poulson & Co.: Please pay to the order of C. W. Nelson \$327.85, and charge same to my account. C. H. Erickson." The evidence shows that this order was drawn and presented by Nelson to the defendant for acceptance before the logs were delivered, but was not accepted in writing, although the defendant promised verbally to pay it when the logs should be delivered, if there was a sufficient amount due the plaintiff for that purpose, and, if not, to apply thereon whatever should be due him. The order, however, not being paid, was returned by Nelson to the plaintiff, who thereafter demanded of the defendant the balance due on the logs, and exhibited to it the Nelson order. The defendant refused to pay such balance until the order should be indorsed by Nelson, and the indorsement guaranteed; whereupon this action was commenced, resulting in a judgment in favor of plaintiff, and defendant appeals.

There are several assignments of error, but, as the rulings of the trial court to which they refer all grew

out of the erroneous theory that a verbal acceptance by the defendant of the order drawn upon it by the plaintiff in favor of Nelson was sufficient to render it liable thereon, it will not be necessary to examine the errors as assigned.

1. There is no ground for the argument that the order operated as an equitable assignment to Nelson of the claim due, or to become due, from the defendant to the plaintiff. To give a draft or an order such an effect, it must, by its terms, be drawn upon a particular fund: *McDaniel v. Maxwell*, 21 Or. 202 (27 Pac. 952, 28 Am. St. Rep. 740). This order is not so drawn. It is simply a written request by the plaintiff to the defendant to pay to Nelson absolutely, at all events, a specified sum of money, and is an inland bill of exchange: *Hawley v. Jette*, 10 Or. 31 (45 Am. Rep. 129). The defendant, therefore, owed no duty to the payee, nor did it become his debtor unless the draft had been legally accepted by it: 1 Daniel, Neg. Inst. §§ 480, 493; *Anderson v. Jones*, 102 Ala. 537 (14 South. 871.)

2. Now, the statute provides that "no person within this state shall be charged as an acceptor of a bill of exchange unless his acceptance shall be in writing, signed by himself or his lawful agent:" Hill's Ann. Laws, § 3194. There is no pretense that the defendant ever so accepted the order, and, as a consequence, under the express provisions of the statute, it never became liable thereon. Its counsel claim, however, that the statute was passed for the benefit of the drawee, and the objection that the acceptance was not in writing can only be raised by him; and two Pennsylvania cases are cited in support of this contention, but in neither of them was the question of the effect of a verbal acceptance of a bill of exchange involved: (*Ulrich v. Hower*, 156 Pa. St. 414, 27 Atl. 243; *Moeser v. Schneider*, 158 Pa. St. 412, 27 Atl. 1088);

and the dictum of the court on that question is at variance with the decided cases of that and other States, which agree that, under a statute like ours, no action can be maintained on an acceptance of a bill of exchange unless it is in writing and signed by the drawee: *Maginn v. Bank*, 131 Pa. St. 362 (18 Atl. 901); *National State Bank v. Lindeman*, 161 Pa. St. 199 (28 Atl. 1022); *Anderson v. Jones*, 102 Ala. 537 (14 South. 871); *Duncan v. Berlin*, 60 N. Y. 151; *Hall v. Flanders*, 83 Me. 242 (22 Atl. 158); *Elliott v. Miller*, 8 Mich. 132; *Bassett v. Haines*, 9 Cal. 260; *Luff v. Pope*, 5 Hill, 413; *Weinhauer v. Morrison*, 49 Hun. 498 (2 N. Y. Supp. 544); *Dickinson v. Marsh*, 57 Mo. App. 566; *Haeberle v. O'Day*, 61 Mo. App. 390; *Upham v. Clute*, 105 Mich. 350 (63 N. W. 317). If, under the statute, no action can be maintained against the drawee on a verbal acceptance, then certainly there is no liability on his part; and, if there is no liability, he, of course, cannot set up such order, and his verbal acceptance thereof, as a defense or counterclaim in an action brought against him by the drawer. Since it is admitted that the defendant never accepted in writing the order in question, it necessarily follows, from these views, that its defense to this action must fail, and the judgment must be affirmed.

AFFIRMED.

Argued 12 October; decided 31 October, 1898.

DENNY v. MCCOWN.

[54 Pac. 952.]

1. DEFINITION OF THE WORD "VOID."—The word "void," in Hill's Ann. Laws, § 2736, providing that all obligations whereby land situated in more than one county in the State is made security for the payment of a debt shall be void,—must be given its ordinary meaning of null and incapable of confirmation, since it is apparent that the purpose of the section is to secure to the state the revenues to be obtained from the assessment and taxation of mortgages of real property.

84	47
38	590
84	47
43	421

2. CURING VOID CONTRACT BY SUBSEQUENT LEGISLATION.—No statutory ratification or subsequent legislation can make valid a contract that was null and void at its inception; thus, where a mortgage is absolutely void, because it covers land in more than one county, its validity cannot be cured by subsequent legislation repealing the provision, or consolidating counties in such a way as to bring the lands mortgaged within one county.
3. REMEDY AT LAW—JURISDICTION OF EQUITY.—The rule that when equity has obtained jurisdiction for one purpose it will proceed to administer complete justice cannot be invoked to procure a money judgment in a foreclosure suit where the mortgage was adjudged void, for the equitable jurisdiction depended on the validity of the mortgage, and as to the money claim there is an adequate law remedy: *Ming Yue v. Coos Bay R. R. Co.*, 24 Or. 392, and *Stemmer v. Scottish Ins. Co.*, 38 Or. 86, followed.

From Multnomah: LOYAL B. STEARNS, Judge.

Foreclosure by O. N. Denny and others against Sarah M. McCown. From a judgment for plaintiffs, defendant appeals.

REVERSED.

For appellant there was a brief over the names of *Brownell & Campbell*, and *Starr, Thomas & Chamberlain*, with an oral argument by *Mr. Geo. C. Brownell*.

For respondent there was a brief over the name of *Dolph, Nixon & Dolph*, with an oral argument by *Mr. Chester V. Dolph*.

MR. JUSTICE MOORE delivered the opinion of the court.

This is a suit to foreclose a deed intended as a mortgage. The facts are that on October 28, 1892, the Portland Savings Bank, a corporation, loaned to defendant the sum of \$5,000, and agreed to advance the further sum of \$7,500, to secure the payment of which she on that day executed to H. C. Stratton, in trust for said bank, a deed which purported to convey certain real property situated in the Town of Sellwood, in the counties of Clackamas and Multnomah, in the State of Oregon; that on December 27, 1892, the bank also loaned to

defendant the sum agreed to be advanced, whereupon she executed to it a promissory note for the sum of \$12,500, payable in six months, with interest from that date at the rate of nine per cent. per annum, no part of which has been paid, except the interest to June 27, 1893. The suit was instituted by the Portland Savings Bank and H. C. Stratton, its trustee; but O. N. Denny, having been appointed receiver for the bank, was by order of the court substituted as plaintiff. The complaint is in the usual form, and its material allegations are admitted; but it is claimed in the answer that, by reason of the attempt to create a lien upon real property situated in more than one county, the trust deed is void. A trial being had upon this issue, it resulted in a decree for the plaintiffs.

1. It is contended by defendant's counsel that Section 2736, Hill's Ann. Laws, which was in force when the trust deed was executed, renders the instrument ineffectual to create a lien, because the real property covered by it was situated in more than one county, and that the court erred in refusing to dismiss the suit; while plaintiffs' counsel insist that, if the deed is void at all, it is only so for the purposes of assessment and taxation; that if it should be held, however, that the deed did not create a lien at the time it was executed, the legislative assembly, prior to the commencement of the suit, cured the defect and afforded a remedy for the foreclosure by repealing Section 2736, *supra* (Laws 1893, p. 6), and also by changing the boundary of Clackamas County, so that the whole territory of Sellwood, including the premises in question, is now within Multnomah County (Laws 1893, p. 78); and that in any event, if it should be held that no lien was created by the trust deed, a court of equity, having obtained juris-

diction, had authority to render a decree for the amount demanded, which ought not to be disturbed on appeal.

The title of the act which included Section 2736, *supra*, reads: "An act to define the terms 'land' and 'real property' for the purpose of taxation, and to provide where the same shall be assessed and taxed, and to declare what instruments whereby land and real property is made security for the payment of a debt, shall be void, and to repeal Sections 2 and 7 of Chapter LVII of the Miscellaneous Laws of Oregon:" Laws 1882, p. 64. Section 1 of this act, after defining "real property" and "land," contains the following provision: "And a mortgage, deed of trust, contract, or other obligation, whereby land or real property situated in no more than one county in this state, is made security for the payment of a debt, shall, for the purposes of assessment and taxation, be deemed and treated as real property." It will be seen, from the title of the act and the language quoted, that the words "mortgage, deed of trust, or other instrument," etc., are, for the purpose of taxation, defined to mean "land" or "real property." The legislative assembly declared by statute that a lien was land—that the shadow was the substance—only for the purpose of assessment and taxation, and not that a mortgage embracing lands in more than one county was to be deemed void for the purpose of taxation. If such a construction of the statute had been permissible, mortgages prohibited thereby would have been taken for the purpose of avoiding the assessment and taxation of such securities. Plaintiff's counsel argues, however, that the statute rendering a mortgage on real property situated in more than one county void is in the nature of a penalty, and, this being so, the mortgagee would be compelled to pay in each county the whole amount of taxes which might be assessed thereon in other counties. Section 2

of the act under consideration, which is incorporated in Hill's Ann. Laws as Section 2735, reads: "All land shall be assessed and taxed in the county where the same shall lie." It is evident that since a mortgage is deemed to be land, within the purview of the act, the assessor of one county would have no extra-territorial jurisdiction, and would be powerless to assess mortgages of real property situated in another county, although the mortgage may have been recorded in the former county.

Section 2736, *supra*, so far as it applies to the case at bar, reads as follows: "All mortgages, deeds of trust, contracts, or other obligations hereafter executed, whereby land situated in more than one county in this state is made security for the payment of a debt, shall be void." The argument of plaintiffs' counsel proceeds upon the theory that the word "void," in this clause of the statute, should be construed to mean "voidable" only, and that, giving to the statute such an interpretation, the defect in the trust deed was cured by the repeal of the mortgage tax law, and also by the change in the boundary of Clackamas County. In *Van Shaack v. Robbins*, 36 Iowa, 201, Mr. Justice COLE, after citing many cases to illustrate the rule for construing the word "void" when used in a statute, says: "These cases abundantly show that the word 'void' does not always mean 'null and incapable of confirmation;' but its true meaning is always to be determined from all the language used, and the intent thereby manifested. Where the word is used to secure a right to or confer a benefit on the public, it will, as a rule, be held to mean 'null and incapable of confirmation.' But, if used respecting the rights of individuals capable of protecting themselves, it will often be held to mean 'voidable' only; just as the word 'may' will be construed to mean 'must,' where that appears to be the intent of the statute, and, generally, where the public

interests and rights are concerned, it will be interpreted to mean 'must,' or the imperative." This court has construed the word "may" to mean "must" when used in a statute under the circumstances indicated in the opinion, an extract of which is just quoted: *Smith v. King*, 14 Or. 10 (12 Pac. 8); *Kohn v. Hinshaw*, 17 Or. 308 (20 Pac. 629); *McLeod v. Scott*, 21 Or. 94 (26 Pac. 1061, and 29 Pac. 1). Applying the rule deducible from these cases, it is manifest that the legislative assembly, by the use of the word "void" in section 2736 of our statutes, intended to secure to the state the revenues to be obtained from the assessment and taxation of mortgages of real property; and, the act being evidently designed to promote the public welfare, and not to protect the interests of any person, the word under consideration must be given its ordinary meaning. See, also, 28 Am. & Eng. Enc. Law (1 ed.) 475, and cases in note 2.

2. Plaintiffs' counsel, in support of their contention that the repeal of the mortgage tax law, prior to the commencement of the suit, cured the defect in the trust deed, and revived the remedy for its foreclosure, cite the case of *First National Bank v. Henderson*, 101 Cal. 307 (35 Pac. 899), in which plaintiff, a banking corporation, brought an action to recover the amount of certain payments made upon defendant's checks. One of the defenses interposed was the failure of plaintiff to comply with the provisions of an act of California (Stat. 1876, p. 729) which required certain officers of a banking corporation to publish in a newspaper, and file in the recorder's office, a sworn statement of the amount of capital actually paid into such corporation, and also provided that "no person or persons who fail to comply with the provisions or any of the provisions of this law, shall maintain or prosecute any action or proceeding in any of the courts of this state until they shall have first duly filed the statement herein

provided for, and in all other respects complied with the provisions of this law.''' Judgment having been rendered against the defendants, one of them appealed, pending which the legislative assembly repealed the act requiring such statement; and it was held that its provisions were in the nature of a penalty, and intended merely to secure compliance with the statute, and that the repeal thereof, pending the appeal in an action brought by the corporation, deprived the appellate court of the power of rendering a judgment enforcing such penalty. It will be observed that the act of California did not inhibit a banking corporation from entering into contracts, but postponed the remedy for their enforcement until the officers of such corporations had complied with the legal requirements. Such a contract being valid, the defense to an action for a breach of its stipulations was in the nature of a plea in abatement; but in the case under consideration, the contract being void by the terms of the statute, a defense to a suit for the foreclosure of a mortgage embracing real property in more than one county is in the nature of a plea in bar. The contract, having been void at its inception, was incapable of ratification; and, this being so, the repeal of the statute could not have the effect of creating a lien on the property in question.

3. The rule that a court of equity, obtaining jurisdiction of a cause for one purpose will retain it until complete justice is administered can have no application to the case at bar; for, the jurisdiction to foreclose the trust deed being dependent upon the existence of the lien, it could not be legally exercised, on account of the invalidity of the instrument, and, the plaintiff having a complete and adequate remedy at law upon the note, the court was powerless to award a money judgment thereon: *Beacannon v. Liebe*, 11 Or. 443 (5 Pac. 273) *Phipp's v.*

Kelly, 12 Or. 213 (6 Pac. 707); *Ming Yue v. Coos Bay R. R. Co.*, 24 Or. 392 (33 Pac. 641); *Stemmer v. Scottish Ins. Co.*, 33 Or. 65 (53 Pac. 498). It follows that the decree must be reversed, and the suit dismissed.

REVERSED.

Argued 17 November; decided 5 December, 1898.

VAUGHN v. SMITH.

[55 Pac. 99.]

1. **VENDOR AND PURCHASER—CONSTRUCTIVE FRAUD—RESCISSION.**—Representations made by the vendors of real estate respecting the condition of the title, which, though innocently made, were false in fact, and were relied on by the purchaser, constitute such a constructive fraud as will authorize a court of equity to treat the deed as an executory contract to convey, and to decree the rescission thereof.
2. **RESCISSION OF CONTRACT—DUTY OF INJURED PARTY.**—A vendee desiring to rescind a contract on the ground of fraud, accident, or mistake, must proceed promptly, on the discovery of the alleged infirmity, to place the other party *in statu quo* by returning or offering to return that which he has received: *Crossen v. Murphy*, 81 Or. 114, approved.
3. **RESCISSION—EFFECT OF DELAY.**—A grantee loses his right to rescind a deed and recover the purchase price because of false representations by the grantor by remaining in possession and making improvements after discovering the falsity of the representations: *Scott v. Walton*, 32 Or. 400, approved.

From Washington: THOS. A. McBRIDE, Judge.

Suit by William Vaughn against James M. Smith and another. From a decree dismissing the complaint, plaintiff appeals.

AFFIRMED.

For appellant there was a brief over the names of *Cicero M. Idleman* and *A. Evan Reames*, with an oral argument by *Mr. Cicero M. Idleman*.

For respondent there was a brief and an oral argument by *Mr. Thos. H. Tongue*.

34	54
38	221
34	64
37	408

MR. JUSTICE MOORE delivered the opinion.

This is a suit to cancel a deed to real property, and to recover the consideration paid, and the value of improvements made thereon. The substance of the complaint is that defendants, on April 9, 1890, in consideration of the payment of \$2,000, sold and (by a deed containing a covenant of warranty against incumbrances) conveyed to plaintiff a tract of land in Washington County, Oregon, containing fourteen and three-fourths acres, which they fraudulently represented to him was free from incumbrance, and, having no knowledge of the falsity of such statement, he relied thereon, and was induced thereby to forego an examination of the records of said county concerning the means whereby defendants' right to said premises was established, and was also persuaded by them not to procure an abstract of the title thereof; that, prior to the execution of said deed, defendants had granted and conveyed an easement in said land to one J. F. Saunders, who, with divers other persons, drives across the same, in consequence of which the said warranty has wholly failed; that about September 1, 1892, plaintiff erected on the premises a dwelling house and other buildings, paying therefor the sum of \$400, and about March 1, 1893, expended the sum of \$75 in clearing the land, so as to render it fit for cultivation. Defendants, after denying the material allegations of the complaint, allege that prior to the execution of the deed to plaintiff they informed him of the existence of said right of way, whereupon it was agreed that this easement should be excepted from the operation of the covenant of warranty, but, by the inadvertence of the scrivener, no reservation was made in the deed, and defendants executed the same without knowledge of the omission; that plaintiff, with full knowledge of these facts, entered into,

and has continuously retained, possession of the granted premises, and taken the rents and profits thereof, amounting to the sum of \$675, and has never made any offer to reconvey the land to defendants, or demanded the return of the purchase money. The reply having put in issue the allegations of new matter contained in the answer, a trial was had, and, from the evidence taken, the court found the facts as alleged in the complaint, except that defendants' representations were made "unthoughtedly;" that plaintiff paid on account of the purchase the sum of \$500 only, and gave his note and a mortgage on the premises to secure the payment of \$1,500; and that the money expended in clearing the land and erecting buildings thereon amounted to the sum of \$400. The court also found that plaintiff had never disaffirmed the contract, or reconveyed said land to defendants, or made any demand upon them for the return of the money paid by him, or offered to account for the use and occupation of the premises, or the rents derived therefrom; that plaintiff, with full knowledge of the existence of said right of way, had cleared and improved the granted premises, erected buildings thereon, paid an installment of interest due on said mortgage, leased the land, and collected the rents thereof, which he retained, and in all other respects acted as the owner, and was then in the possession of said premises; and upon such findings dismissed the suit, and plaintiff appeals.

1. The defendants' representations with regard to the condition of the title to the premises being false in fact, though made, as the court finds, "unthoughtedly," and being relied and acted upon by plaintiff, constituted such constructive fraud as will authorize a court of equity to treat the deed as an executory contract to convey, and rescind the same: 4 Ballard, Ann. Real Prop., § 855; *West v. Wright*, 98 Ind. 335; *Woodruff v. Garner*, 27 Ind.

4 (89 Am. Dec. 477); *Bullitt v. Farrar*, 42 Minn. 8 (18 Am. St. Rep. 485, 6 L. R. A. 149, 43 N. W. 566); *Groppegeisser v. Lake*, 103 Cal. 37 (36 Pac. 1036); *Baker v. Maxwell*, 99 Ala. 558 (14 South. 468). Defendants' representations, therefore, however innocently made, afford no defense to the suit; and hence the decree must rest upon the findings of the court which are predicated upon the allegations contained in the answer.

2. The law is well settled in this State that a party desiring to rescind a contract must act promptly upon the discovery of the accident, fraud, or mistake, which affords a ground for the relief sought, and place the other party *in statu quo*; returning or offering to return that which has been received: *Knott v. Stephens*, 5 Or. 235; *Frink v. Thomas*, 20 Or. 265 (12 L. R. A. 239, 25 Pac. 717); *Clarno v. Grayson*, 30 Or. 111 (46 Pac. 426); *Crossen v. Murphy*, 31 Or. 114 (49 Pac. 858).

3. In *Scott v. Walton*, 32 Or. 460 (52 Pac. 180), Mr. Justice BEAN, in speaking of the right and duty of a party who seeks to rescind a contract, says: "A party who has been induced to enter into a contract by fraud has, upon its discovery, an election of remedies. He may either affirm the contract, and sue for damages, or disaffirm it, and be reinstated in the position in which he was before it was consummated. These remedies, however, are not concurrent, but wholly inconsistent. The adoption of one is the exclusion of the other. If he desires to rescind, he must act promptly, and return or offer to return what he has received under the contract. He cannot retain the fruits of the contract, awaiting future developments to determine whether it will be more profitable for him to affirm or disaffirm it. Any delay on his part, and especially his remaining in possession of the property received by him under the contract, and dealing with it as his own, will be evidence of his intention to abide by the

contract.''' In the case at bar the evidence supports the finding of the court that plaintiff remained in possession of the land after he had discovered the existence of the right of way across the premises, and treated the property as his own, thereby manifesting an intention to ratify the contract, which precludes its rescission; and, this being so, the decree is affirmed.

AFFIRMED.

Argued 24 October; decided 7 November, 1898.

IN RE DARST'S WILL.

HURLEY v. O'BRIEN.

[54 Pac. 947.]

1. WILLS—UNDUE INFLUENCE.*—Influence arising from gratitude, or esteem, is not undue, nor can it become such unless it destroys the free agency of the testator at the time the instrument is made, and results in determining the execution in the particular manner adopted.
2. WILLS—WEIGHT OF EVIDENCE—APPEAL.—The conclusion of the county judge who heard the witnesses, and was the neighbor of most of them, upon the issue as to undue influence in procuring the execution of a will is entitled to great weight on appeal, and his decision will be upheld unless the appellate court can say from an examination of the record that the weight of the testimony is the other way.

From Marion: HENRY H. HEWITT, Judge.

*NOTE.—As to what is undue influence sufficient to invalidate a will, see extended monographic note to *In re Hess's Will*, 31 Am. St. Rep. pp. 670-681; *Eastis v. Montgomery*, 36 Am. St. Rep. 228; *Knox v. Knox*, 36 Am. St. Rep. 235; *Cush v. Lust*, 64 Am. St. Rep. 583; *Kerr v. Lunsford*, 2 L. R. A. 688; *Davis v. Strange's Executor*, 8 L. R. A. 261; *Orchardson v. Cyfield*, 40 L. R. A. 256, 63 Am. St. Rep. 211.

With the case of *Richmond's Appeal*, 21 Am. St. Rep. 94-104, is a long note discussing the question when a presumption of undue influence arises, and the same subject is considered in *Goodbar v. Lidikey*, 43 Am. St. Rep. 302; *In re Hess's Will*, 31 Am. St. Rep. 681; *Henry v. Hall*, 54 Am. St. Rep. 22; *Maddox v. Maddox*, 35 Am. St. Rep. 734. Note in 36 L. R. A. at p. 724.

The closely allied question of who has the burden of proof where the will is claimed to be invalid because of undue influence, is considered in the following cases: *Harrison v. Bishop*, 31 Am. St. Rep. 422; *In re Hess's Will*, 31 Am. St. Rep. 681; *McMaster v. Scriven*, 39 Am. St. Rep. 828; *Cush v. Lust*, 64 Am. St. Rep. 576. Note in 36 L. R. A., pp. 733-740.—REPORTER.

Proceedings to set aside the probate of the will of Catharine E. Darst, deceased. An order of the county court probating the will was affirmed in the circuit court on petition of the proponents Joanna O'Conner O'Brien and others, and contestants James J. Hurley, administrator, and others, appeal.

AFFIRMED.

For appellants there was a brief over the names of *Williams, Wood & Linthicum*, and *Sherman, Condit & Park*, with an oral argument by *Messrs. Geo. H. Williams* and *A. O. Condit*.

For respondents there was a brief and an oral argument by *Messrs. Peter H. D'Arcy* and *Tilmon Ford*.

MR. JUSTICE MOORE delivered the opinion.

This is a proceeding instituted in the County Court of Marion County to have the probate of the will of Catharine E. Darst, deceased, vacated, and the will set aside and declared void. The testatrix died at Independence, Oregon, June 24, 1894, unmarried and without lineal descendants, leaving an estate in Marion County valued at about \$26,000, and a will, executed by her five days prior to her death, by the terms of which she bequeathed to the Very Rev. F. X. Blanchet, of Gervais, and to Rev. J. S. White, of Salem, Oregon, the sum of \$250 each, for masses to be celebrated by them for the repose of her soul, and that of her deceased husband; to her sister, Eliza O'Conner, she devised her home at Gervais, in said state, consisting of a house and a block of land, which were appraised at \$1,000; to her sister, Mary A. Hurley, she bequeathed the sum of \$2,500; and to her sister, Joanna O'Brien, she devised and bequeathed the residue of her property; and nominated Rev. J. S. White

and A. N. Bush, also of Salem, as co-executors thereof, without bonds. The county court sustained the validity of the will, and made an order re-probating it, from which the contestants appealed to the circuit court, which affirmed the said orders, and from this latter decree the contestants appealed to this court.

It is contended by counsel for contestants that at the time the testatrix executed the pretended will she was suffering from pain to such an extent as to render her mind feeble and her will power easily overcome, and that Joanna O'Brien, having knowledge of her mental condition, fraudulently induced her to execute a pretended will, different from what she had intended. The testimony shows that the testatrix, at her death, left the following named sisters as her only heirs, to wit: Ellen Pembroke and Anna McDonald, residing at Keokuk, Iowa; Mary A. Hurley and Eliza O'Conner, at Gervais; and Joanna O'Brien, at Independence, Oregon. Her reason for neglecting to make any devise or bequest to her sisters in Iowa, and for the disposition made of her money and property, may be inferred from a brief statement of the relations existing between her and her sisters, and of her feelings towards them. The testimony tends to show that Mrs. O'Brien was always her favorite; that she lived with this sister in Ireland, but, Mrs. O'Brien having immigrated to this country and settled in Iowa, the testatrix removed to that state, and made her home with Joanna until 1867, when she came to Oregon, and two years thereafter married William Darst, and settled in Marion County; whereupon Mrs. O'Brien, at her request, left Iowa, came to this state, and settled near her. In 1883 her sister Eliza came to this state, and lived with and worked for Mrs. Darst eleven years, aiding her in housekeeping, for which service Eliza says her sister promised to give her two shares of her estate,

and other witnesses testify that Mrs. Darst had said to them that she intended to provide well for Eliza O'Conner. After Mr. Darst's death, Miss O'Conner became ill, and in the fall of 1894 Mrs. Darst furnished her the means for travel and treatment; whereupon she went to Iowa, entered a hospital, and submitted to a surgical operation for her ailment, and returned a few days before her sister died. Mrs. Darst, after Eliza's departure, seemed to blame her for leaving, claiming that in consequence thereof she was obliged to break up housekeeping. Mrs. Darst, in the fall of 1894, became afflicted with inflammatory rheumatism, and went to live with her sister Mrs. Hurley, remaining with her until February 15, 1895, when Mrs. O'Brien, at her request, took her to St. Vincent's Hospital at Portland, Oregon, where she remained until May 31 of that year, when Mrs. O'Brien, at her request, took her to her home, where she died. Mrs. Darst had loaned the sum of \$2,500 to her nephew James Hurley, who failed to pay the interest due thereon in the fall of 1894; whereupon her bankers, at her request, demanded payment of the amount so due, in consequence of which considerable ill feeling was engendered between the testatrix and Mrs. Hurley and the members of her family; and Mrs. Darst, being asked, after she went to Mrs. O'Brien's, if Mrs. Hurley should be invited to see them, replied: "I beg of you, for God's sake, to keep them away. I don't want to see one of them." Mary Hurley, a niece of the testatrix, however, went to wait upon her aunt; whereupon the latter said: "She is trying to do all she can for me now, but it won't do her any good. When I was on her floor, she would not give me a drink of water." Mary Hurley, in referring to this remark, says: "I can say that it is not true. When she was at our house she received the best of care. She asked for a drink one day, and my sister went to get

it, and it was not taken in right away, but I took it in afterwards." Mrs. Hurley, in answer to the question whether she had any quarrel with Mrs. Darst, said: "I had no quarrel with her. She said she had given me something, and I said: 'No, your didn't; you gave that to Mrs. O'Brien. Mrs. O'Brien got it.' "

This epitome of the testimony will serve to show the state of Mrs. Darst's mind when, on June 19, 1895, Rev. J. S. White, at her request, after he had excluded all persons from and closed the doors of her room, wrote her will as she dictated. She had a reason for the disposition of her property, as is manifest from the testimony of Rev. J. S. White. He says that she expressed a desire to bequeath to him \$500 for masses, but he told her she ought to leave to her pastor at Gervais one-half of that, to which she assented, and it was so expressed in the will. That Mrs. Darst said to him, in response to his inquiry if she did not intend to leave Eliza O'Connor any money: "If I leave her any money, she would travel; would go to Ireland, and spend it all in traveling. I want to give her some property that will hold her down, and out of which she will derive an income to help her along." That the testatrix, speaking of the bequest to Mrs. Hurley, said: "This is the amount of the note which they owe me; that will cover this note." That, knowing the Sisters of St. Vincent's Hospital expected some donation from the testatrix, he asked her if she wished to make any bequest to them, to which she replied, "No; they got already all that I am going to give them;" and, in answer to his inquiry if she intended to leave any sum to the Sisters of the Precious Blood of Mt. Tabor, she said, "I gave them \$1,000 in cash, and that is all I am going to give them." In speaking of her reason for not making any provision for her sisters in Iowa, the testatrix said: "I have not seen them, nor heard

from them, for so long that they have passed out of my existence." She also told Rev. J. S. White that her reason for making such a donation to Mrs. O'Brien was that she had been good to her, and she wanted to reward her for her kindness. Mary Hurley, in speaking of Mrs. O'Brien's method of influencing Mrs. Darst against her relatives, says: "At one time I came into the room to see Mrs. Darst, and Mrs. O'Brien was upon the bedside whispering, and just as I came in she was speaking of myself. She said to Mrs. Darst that I came there for my health. That I was in poor health, and it seemed to be an incumbrance to her, but she would keep me for what benefit it would do me. This was the first I remember of the whispering. When I came in she stopped, and then she spoke my name over, and said, 'I would do what I could for her,' when I was in the room. After that I saw her from a distance, whispering. What the conversation was I did not hear. The next time was the eighteenth of June. As I was coming into the room she mentioned mother's name, and she was stooping over the bed and whispering to her. Mrs. Darst was hard of hearing at this time, somewhat. She says, 'Now, you give her that much,' and then mentioned mother's name, 'and for him, you make him come out with the last cent he has beat you.' Those were the words she said when I was coming into the room, and as I came in she mentioned Jimmie's name (my brother's name) in a low tone. I understood the name distinctly both times, and knew what she was talking about, and then she smoothed it over, and says, 'Poor Jimmie, don't be hard on him.' Before that she had told her to make him come out with the last cent."

Miss O'Conner says that Mrs. O'Brien, in speaking of the probabilities of Mrs. Darst making a will, said, "Never you mind, I will see that she makes her will."

Mrs. O'Brien denies these statements, and there is a decided conflict in the testimony as to the part claimed to have been taken by her in procuring the execution of the will. Miss O'Conner also says that a few days prior to her sister's death she said to witness: "You have been a cruel sister to me to write that letter to me from Keokuk, telling me you were coming out to see me one day, and going back the next day." This witness says that no such letter was written, but admits that when this statement was made she thought Mrs. Darst "might not be very steady in her head, from sickness." Dr. MacKenzie, one of the physicians at St. Vincent's Hospital, who waited upon and saw Mrs. Darst daily while she was in that institution, says that the rheumatic attack had an exhaustive effect on the patient's nerves, and that in consequence thereof he thought that the state of her mind was such that she could be easily influenced. Dr. T. J. Lee, of Independence, who was Mrs. Darst's physician from June 5, 1895, to the twentieth of that month, the day after the execution of the will, says that he regarded her mind as sound. Dr. Walter Babbitt, of Independence, visited Mrs. Darst June 22, 1895, and also on the morning of her death, and says that her mind was clear. Mr. A. N. Bush, of Salem, Mrs. Darst's banker, expresses the opinion of many other witnesses, when, in speaking of her, he says: "She was a woman of her own opinions, and I do not think she could have been influenced easily, if at all." It would be useless to quote more of the testimony, for to do so would not reconcile the conflicts therein. It was admitted at the argument that Mrs. Darst, at the time the will was executed, had possession and control of her mental faculties. The fact that she left the bulk of her wealth to Mrs. O'Brien, who possessed a competence without it, and made such an

inadequate provision for Miss O'Conner, who had toiled so faithfully for her, and none at all for her aged and needy sisters in Iowa, seems inconsistent. But, however that may be, the testatrix was the sole owner of her property, and enjoyed the legal right of disposing of it in such manner as best satisfied her wishes, and it only remains to be seen whether the instrument in question is the voluntary act of the testatrix, or the product of her chief beneficiary.

1. Influence arising from gratitude, affection, or esteem is not undue, nor can it become such unless it destroys the free agency of the testator at the time the instrument is executed, and shows that the disposition which he attempted to make of his property therein results from the fraud, imposition, and restraint of the person whose superior will prompts the execution of the testament in the particular manner which the testator adopts: *Gardiner v. Gardiner*, 34 N. Y. 155; *Dean v. Negley*, 41 Pa. St. 312 (80 Am. Dec. 620); *Eckert v. Flowry*, 43 Pa. St. 46; *Kinne v. Johnson*, 60 Barb. 69; *Seguine v. Seguine*, 42 N. Y. 663; *Trumbull v. Gibbons*, 22 N. J. Law, 117 (51 Am. Dec. 253); *Small v. Small*, 4 Me. 220 (16 Am. Dec. 253).

The uncontradicted testimony of several witnesses tends to show that Mrs. Darst always considered Mrs. O'Brien as her favorite sister. This mutual friendship undoubtedly began when the testatrix made her home with Mrs. O'Brien in Ireland, grew when she lived with her in Iowa, was renewed when Mrs. O'Brien, at her request, came to this state, that they might be near each other, and continued unabated until Mrs. Darst died. Their intimate relation might reasonably excite in Mrs. Darst's mind those instincts of affection for, and gratitude to, Mrs. O'Brien which prompted her, as she said, "to reward her for her kindness."

It is argued by counsel for proponents that Mrs. Darst's frugality had resulted in the accumulation of quite an estate, and that Mrs. O'Brien possessed a similar mental quality, the exercise of which had resulted in the same manner, while the other sisters were improvident, and that the testatrix realized that if she bequeathed her money to them it would be squandered. While there is no positive evidence that she made Mrs. O'Brien her chief beneficiary in order that her estate might be preserved, such a conclusion is fairly inferable from a consideration of her careful mode of doing business.

2. Upon the question of Mrs. O'Brien's alleged fraud in poisoning the testatrix's mind against her sisters, and all other acts which would tend to alienate her affection for them, and secure the estate for herself, the testimony is very conflicting; but the county judge, who heard the witnesses, was the neighbor of most of them, and his conclusion thereon is entitled to great weight, and, having found that there was no undue influence exercised by Mrs. O'Brien, we cannot say, from an examination of the record, that the weight of the testimony is the other way, and hence it follows that the decree is affirmed.

AFFIRMED.

Argued 5 October; decided 7 November, 1898.

TOEDTEMEIER v. CLACKAMAS COUNTY.

[54 Pac. 954.]

STATUTORY CONSTRUCTION—TRACTION ENGINES.—The words "steam portable or traction engine," as used in the first section of the act of November 25, 1885 (Hill's Ann. Laws, §§ 4136-4138), relating to the moving of "traction or portable engines on public highways," have the same meaning as the words "steam traction or portable engines," used in the third section of that act. The expressions are convertible and intended in both cases to apply only to engines propelled by steam, within the rule that words or phrases of doubtful meaning are controlled in their legal significance by like words or phrases appearing elsewhere in the same act, where such a construction is reasonable.

RULE FOR CONSTRUING DOUBTFUL PHRASES.—Words or phrases of doubtful or obscure meaning in a statute are controlled in their legal signification by the same or like words or phrases used or appearing elsewhere in the same or another act to which special reference is made, wherein by reason of the context, grammatical environment, or some specific or other explanation, they are rendered clear and their explanation definite, unless the object to which they are applied, or the connection in which they appear, renders them obscure or meaningless in that sense, or requires them to be differently understood.

From Washington: THOS. A. McBRIDE, Judge.

Action by L. Toedtemeier and another against Clackamas County. From a judgment for defendant, plaintiffs appeal.

REVERSED.

For appellants there was a brief over the names of *Fenton, Bronaugh & Muir*, and *Samuel B. Huston*, with an oral argument by *Mr. William D. Fenton*.

For respondent there was a brief over the names of *Brownell & Campbell, Gordon E. Hayes, Livy Stipp*, and *T. J. Cleeton*, District Attorney, with an oral argument by *Mr. Geo. C. Brownell*.

MR. CHIEF JUSTICE WOLVERTON delivered the opinion.

This action is for the recovery of damages alleged to have been sustained through the negligence of the defendant. It is alleged, in substance, that one Ernest Boeckman, an employee of the plaintiffs, while driving a team attached to a portable steam engine, the property of the plaintiffs, on a bridge spanning Kruse Creek, which it was the duty of the county to maintain and keep in repair, was, by reason of its breaking down, precipitated, with said team and engine, into said Kruse Creek, a distance of some eighteen feet, whereby said team was wounded, hurt, and bruised, and said engine partially,

if not entirely, destroyed. The engine was one of Russell & Co.'s manufacture, of Massillon, Ohio, six-horse power, portable form, and could only be moved and transported from place to place with a team, or some power other than of its own generation. A defense was interposed, which prevailed in the court below, that the plaintiffs were prohibited, by Section 4138, Hill's Ann. Laws, from driving over any bridge or culvert on any public highway with such engine without using thereon, for the purpose of securing its safety, four stout pieces of plank, each to be at least ten feet in length, one foot in width, and two inches in thickness, two of such pieces to be always under the wheels of such engine while crossing; and that the said Ernest Boeckman drove the same over and upon said bridge without the use of such plank, contrary to the provisions of said section. The plaintiffs contend that the said engine did not come within the purview of the statute, but, if it should be held otherwise, then they maintain that the statute has, notwithstanding, given them a right of action against the county, and that it was not such negligence on the part of their employee to have attempted to so cross the bridge as would defeat a recovery.

In the view we have taken of the matter, it will only be necessary to consider the first of these propositions at this time. The section alluded to is Section 3 of "An act to regulate the passage of bicycles, tricycles, velocipedes, traction, and portable engines on the public highways, or streets, in this state," approved November 25, 1885. The first, second, and third sections of that act are as follows:

"Section 1. It shall be the duty of any person or persons in charge of any steam portable or traction engine, propelled wholly or in part by steam, over the public highways, or streets in this state, to bring the said

portable or traction engine to a stop when within one hundred yards of any person or persons going in the opposite direction with a team or teams, and remain stationary until said team or teams shall have passed by.

"Section 2. It shall be unlawful to blow the steam whistle of such portable or traction engines while upon the public highway, or while passing over the streets of any city, town, or village in this state.

"Section 3. It shall be unlawful for any person or persons to drive any steam traction or portable engine over any bridge or culvert on any public street or highway within this state, without using on such bridge or culvert, for the purpose of securing its safety, four stout pieces of plank, each of which shall be at least ten feet in length, one foot in width, and two inches in thickness, two of the said pieces of plank to be always under the wheels of said steam traction or portable engine, while it shall be crossing said bridge or culvert."

The first section was amended in 1893, but not in such manner as to affect the present controversy. A violation of the provisions of the act is made penal by a subsequent section, and is punishable by both fine and imprisonment; and, in addition, the county is given a right of civil action for all damages resulting to any such bridge or culvert by reason of the crossing of such "steam traction or portable engine."

It will be noticed that the engine described in section 1 is "any steam portable or traction engine, propelled wholly or in part by steam." The engine described in section 3 is "any steam traction or portable engine," and the question is whether, by legislative intendment, the terms "steam portable or traction engine," as used in the first and "steam traction or portable engine," as used in the third section, are convertible in their signification, and mean the same thing. The meaning of the

terms as used in the first section is clear, as they are specifically defined by the clause "propelled wholly or in part by steam." But it is argued that by the use of the phrase "traction and portable engines" in the title of the act, and the absence of either of the terms "said" or "such" from section 3, as used in sections 1 and 2, to particularize the engines there dealt with as being the same as those first described in section 1, the legislature indicated its intention to include all portable as well as all steam traction engines within the operation of the latter section. If this be true, the act has a very wide range, and an engine of any kind or nature, capable of being moved about from place to place, whether by a force generated by the machine itself, or such as may be applied from without, would fall within the category, for it is assumed that there are no qualifying term or terms which confine its application to such portable engines as may be either operated or transported from place to place by steam as an agency of propulsion. The argument proves too much, as it is very evident that neither the legislature nor the promoters of the act designed that it should have an effect so general and comprehensive. The term "traction engine" is well understood, and is defined to be "a locomotive engine for drawing heavy loads upon common roads, or over arable land, as in agricultural operations:" Encyclopædic Dictionary. The word "steam" was used, whether aptly or not, to designate the motive power by which it is propelled. The word "portable" is also well understood, but the use of the term "steam portable," as employed in the first section, is unusual. Its intended signification, however, is applicable only to an engine having locomotion, and propelled wholly or in part by steam. Now, instead of the use of the words "steam portable [engine] or traction engine," which are, in and of themselves, convertible in

their legislative signification as employed in the first section, they are transposed in the third so as to read "steam traction or portable engine," and the word "steam" should qualify "portable," as it does in the first section, and as it qualifies "traction" in the third. There is not the remotest indication anywhere in the act that it was intended to qualify "engine," so as to embrace any portable steam engine. To do this we would be required to interpolate the qualifying word "steam" at a place in the context which would give a significance entirely different and foreign to its use elsewhere in the same act.

It is a rule of statutory construction that words or phrases of doubtful or obscure meaning are controlled in their legal signification by the same or like words or phrases used or appearing elsewhere in the same or another act to which special reference is made, wherein, by reason of the context, grammatical environments, or some specific or other definition or explanation, they are rendered clear, and their application definite and certain, unless the object to which they are applied, or the connection in which they appear, renders them obscure, nonsensical, or meaningless in that sense, or requires them to be differently understood. The rule is stated in *Raymond v. Cleveland*, 42 Ohio St. 529, as follows: "Where the meaning of a word or phrase in a statute is doubtful, but the meaning of the same word or phrase is clear where it is used elsewhere in the same act or an act to which the provisions containing the doubtful word or phrase has reference, the word or phrase in the obscure clause will be held to mean the same thing as in the instances where the meaning is clear." And again, in *James v. Du Bois*, 16 N. J. Law, 293: "It is no doubt a rule of construction that, if a statute makes use of a word in one part of it susceptible of two meanings, and

in another part of the statute the same word is used in a definite sense, we are to understand it throughout in that sense, unless the object to which it is applied, or the connection in which it stands, requires it to be differently understood in the two places." See, also, *Pitte v. Shipley*, 46 Cal. 154, 160; *Rhodes v. Weldy*, 46 Ohio St. 234, 243 (20 N. E. 461, 15 Am. St. Rep. 584).

The rule of construction which permits of the interpolation of words, or any alteration of their collocation, is an exception to the general rule, and is only permissible when the language of the statute, in its ordinary meaning and grammatical construction, leads to the manifest contradiction of the apparent purposes of the enactment, or to some inconvenience, or absurdity, hardships, or injustice, presumably not intended: *Endlich*, *Interp. Stat.* § 295. An application of the first-mentioned rule to the present case renders the meaning of the enactment clear and intelligible, and its purpose obvious and plain, while it obviates a resort to the exception for the purpose of attaching to it legal and practical signification. We are, therefore, constrained to adopt the construction which gives to the terms or phrase "steam traction or portable engine" the same meaning as "steam portable or traction engine," as defined by the first section. This is in harmony with the purposes of the act when the mischief which it was sought to remedy is considered. A traction engine with locomotion propelled wholly or in part by steam is differently constructed from the ordinary portable steam engine which is drawn about from place to place by some force applied from without. As an aid to locomotive propulsion, the drive wheels of the former are provided with calks or skew bars, attached to the rim or surface, to increase their adhesion to the road, and, the motive power being applied from within, the tendency of the machine is to push or shove the stationary substance

upon which it treads backward or from under it by its efforts to move forward; hence, by reason of its structure, manner of propulsion, and great weight, its early use upon the public highways among the farming communities resulted in unusual damage to the small bridges and culverts. The mischief thus resulting did not exist as it pertained to the portable steam-engines mounted on carriages, with smooth tires, or upon ordinary trucks, to facilitate their transportation, which were much less ponderous in weight, and drawn by horses, or some exterior force; so that there existed no more reason for the application of such legislation to engines of this character than to the ordinary vehicle of similar weight in common use upon the roads and highways. There is but little question that the legislature acted in view of these contemporaneous conditions and circumstances, and they are of persuasive force in determining the construction of the law which it has seen fit to enact as a remedy for the mischief then apparent. The act is also of a criminal character, and we are precluded by elementary rules of construction from giving it a liberal interpretation. These considerations impel a reversal of the judgment of the court below, and the cause will be remanded for such further proceedings as may seem appropriate.

REVERSED.

Argued 2 November; decided 14 November, 1898.

CAPITAL LUMBERING CO. v. RYAN.

[54 Pac. 1093.]

1. **MECHANIC'S LIEN—LIMITATIONS—INSTALLMENT PAYMENTS.**—Under Hill's Ann. Laws, § 3675, making a mechanic's lien binding for only six months after its filing unless suit is brought to foreclose, the necessity of suing within the six months is not affected by the fact that the debt is payable in installments which do not all fall due within that time; and hence there can be no recovery as to those installments due more than six months before suit was brought, for a proper adjustment of the unmatured payments could have been made under Section 421 of Hill's Ann. Laws.

84	73
135	76
34	73
88	408
34	73
88	214
34	73
40	44

2. RESTORING CANCELED MORTGAGE.—For convenience in assigning part of a secured debt, the mortgage, which was recorded, was canceled, and two mortgages were executed in its place, one of which was assigned to a buyer who knew that a building was going up on the land, but did not know that plaintiff had furnished material therefor, and did not make any inquiry as to there being outstanding claims against it. *Held*, that he was subrogated to the rights secured by the first mortgage: *Kern v. Hotelling*, 27 Or. 205, applied.
3. PRECEDENCE OF LIEN OVER MORTGAGE.—A mortgagee who knows of the erection of a building on the mortgaged property is not required to give the notice provided for by Hill's Ann. Laws, § 3672, in order to prevent a mechanic's lien taking precedence over his mortgage, since a mortgagee is not "a person having or claiming any interest" in the land.

From Marion : HENRY H. HEWITT, Judge.

Bill by the Capital Lumbering Co. against R. R. Ryan, H. E. Noble, and others, to foreclose a lien. Plaintiff appeals.

AFFIRMED.

For appellant there was a brief over the name of *Carson & Fleming*, with an oral argument by *Mr. J. A. Carson*.

For respondent there was a brief and an oral argument by *Messrs. Richard W. Montague* and *H. J. Bigger*.

MR. JUSTICE BEAN delivered the opinion.

This is a suit to foreclose a mechanic's lien. The facts are that on March 6, 1893, the defendant Ryan, being the owner of lots 1 and 2, in block No. 44, in the City of Salem, gave a mortgage thereon to the defendants, Easton and Chase, to secure the payment of \$2,500, and, in April following, entered into a written contract with the plaintiff, wherein the company agreed to furnish the lumber then intended to be used in the construction of a building on one of the lots included in the mortgage, for the agreed sum of \$666, and also such extra lumber as might be needed at the market price, to be paid for in monthly installments of \$50 each, the first payment to

be made on the tenth day of May, 1893, and a like sum each and every month thereafter until the whole amount should be paid. On May 23, and after plaintiff had furnished the greater part of the lumber as agreed upon, and while the building was in process of construction, Easton and Chase sold to the defendant Noble a portion of the debt secured by the mortgage, and, in order to effect a division thereof, and to complete the sale and transfer, Ryan gave them two mortgages—one for \$1,025, and the other for \$1,500—in lieu of the former mortgage, which was canceled of record, and the mortgage for \$1,025 was assigned and transferred by the mortgagees to the defendant Noble. The building was completed on the seventh of June, 1893, and plaintiff filed its claim of lien on the fifth of the following August for \$834.21, being the aggregate amount of the contract price, and the extra lumber furnished, less \$50 paid in May, and \$80 on July 24, 1893. The suit was commenced on August 4, 1894, against Ryan and Noble to foreclose such lien, and afterwards Easton and Chase were made parties to the suit. All the defendants except Noble suffered default, and thereafter the suit proceeded against him alone. In his answer he denies the material allegation of the complaint, and, for an affirmative defence, sets up the circumstances under which the mortgage owned by him was executed, and prays that it may be given priority over the plaintiff's mechanic's lien, if such lien is established, on the ground that it was taken as a mere substitute for a part of the former mortgage, and in ignorance of plaintiff's claim. The court below held that the plaintiff was entitled to a prior lien on the building in the construction of which its material was used, except for such installments as fell due more than six months prior to the commencement of the suit, but

that Noble's mortgage was entitled to priority as a lien on the land, and a decree was entered accordingly. From this decree the plaintiff appeals.

Three questions were discussed by counsel at the hearing: First, as to whether the plaintiff was entitled to a lien for the installments which became due under its contract with Ryan over six months prior to the commencement of the suit; second, whether it was an original contractor, and therefore entitled to sixty days in which to file its lien, or a material man or lumber merchant, and only entitled to thirty days; and, third, whether the lien of Noble's mortgage was entitled to priority on the land.

1. The first question is clearly answered by the statute, which provides that no lien shall be binding for a longer period than six months after it shall have been filed, or after the expiration of the credit, if any has been given, unless suit be brought within such time to foreclose the same: Hill's Ann. Laws, § 3675. In this case, more than that time had elapsed after the expiration of the credit for all installments falling due on or before the fourth day of February, 1894, and, as to them, the plaintiff lost its lien. It was not required to wait until the last installment became due before bringing its suit, but could have brought it at any time within six months after the filing of the lien, and obtained a decree, as provided in section 421, which is made applicable to suits to foreclose mechanics' liens by section 3677.

2. The second question becomes immaterial if Noble's mortgage on the land is entitled to priority over plaintiff's lien, as was decreed by the court below. Neither Noble nor any of his co-defendants have appealed, and therefore, as to them, the decree establishing the plaintiff's lien on the building, and determining the manner in which the property shall be sold and the proceeds dis-

tributed, is valid and binding, and the only question before us on the plaintiff's appeal is whether the court erred in decreeing that its lien was subject to Noble's mortgage. Noble contends that the decree should not be disturbed, for the reasons (1) that plaintiff's alleged lien was not filed within the time required by the statute, and is, therefore, in fact, no lien at all; and (2) because in equity he is entitled to have his mortgage occupy the same position as to plaintiff's lien as the mortgage for which it was in part given as a substitute. Now, if his second position is sound, it necessarily follows that the plaintiff's appeal is unavailing, and the decree must be affirmed without reference to the other question. It is a familiar rule of law that if one takes a new mortgage as a substitute for a former one, and cancels and releases the latter in ignorance of an existing lien upon the mortgaged premises, equity will, in the absence of some special disqualifying fact, restore him to his former position when it can be done without interfering with any new rights acquired on the faith of the altered condition of the record. This doctrine was applied by this court in *Pearce v. Buell*, 22 Or. 29 (29 Pac. 78), and *Kern v. Hotelling*, 27 Or. 205 (50 Am. St. Rep. 710, 40 Pac. 168), and we think the facts of the case in hand bring it within the rule.

The evidence shows that some time in May, 1893, and while the building upon which plaintiff claims a lien was in process of construction, Easton and wife offered to sell to the defendant, Noble, the \$2,500 mortgage held by Mrs. Easton, and the defendant Chase. Noble declined to purchase the entire mortgage, but offered to take \$1,025 of the amount secured thereby, which was accepted. The mortgagees, however, were unwilling to assign the mortgage, as they still held some \$1,500 of the original debt; and it was thereupon arranged that two

mortgages—one for \$1,025, and the other for \$1,500—should be taken from Ryan in lieu of the \$2,500 mortgage and interest, and that the new mortgage for \$1,025 should be assigned to Noble, and this was done accordingly. The new mortgages were not intended by any of the parties as a payment or satisfaction of the former mortgage, but as a mere substitute therefor, and were adopted as the most convenient way of effecting the transfer of a portion of the debt to the defendant Noble. Before making the purchase, Noble inspected the property covered by the mortgage, and knew that the building upon which the plaintiff claims a lien was uncompleted, but did not know that plaintiff had any claim thereon, or furnished any material therefor, nor did he make any inquiry as to whether there were any outstanding claims against the building, and it is urged that for this reason he is not entitled to the relief which he seeks. But the mere fact that a former mortgage was released, and a new one taken in place thereof, in ignorance of the existence of an intervening lien, is, in equity, deemed such a mistake of fact as will entitle the plaintiff to relief, although such lien is a matter of record: *Pearce v. Buell*, 22 Or. 29, 33 (29 Pac. 78); *Kern v. Hotelling*, 27 Or. 205 (50 Am. St. Rep. 710, 40 Pac. 168). And how much more meritorious is the demand for relief when the existing incumbrance is a mere inchoate right to a lien.

At the time this change was made in the form of the security for the original indebtedness, the lien of plaintiff had not been filed, nor had Ryan made default in his payments; and, this being so, it would be carrying the doctrine further than any adjudged case of which we have knowledge to hold that the defendant Noble is not entitled to have his lien restored to the position of the original mortgage as against the plaintiff's lien, simply because he knew that the building was then in process

of construction and uncompleted, and especially so when such restoration does not interfere with any superior equity. At the time the plaintiff made the contract with Ryan to furnish the lumber for this building, the \$2,500 mortgage was a matter of record; and it either knew or is charged with knowledge of the fact that any lien which it might acquire on the land by reason of its contract would be subsequent and subject to the lien of such mortgage. It sold the lumber to Ryan with knowledge of that fact, and it parted with no property, nor did it change its position in any way, in consequence of the release of the first mortgage. With the Noble mortgage given the same position as the original, the plaintiff will be in no worse position than before its cancellation, and ought not be allowed to profit by a release of the former mortgage made in ignorance of its intervening lien. It was not injured in any way by the change in the form of the mortgage indebtedness. Indeed, it is actually \$1,500 better off than when its right to a lien accrued, because Easton and Chase, who hold the \$1,500 mortgage given in part as a substitute for the original mortgage, have suffered default, so that, under the decree as it now stands, the plaintiff's lien takes precedence over such mortgage. We are, therefore, of the opinion that the decree giving the defendant Noble's mortgage priority over the plaintiff's lien ought not to be disturbed.

3. It is further contended that a mortgagee knowing of the erection of a building on the mortgaged property must give notice, under Section 3672, Hill's Ann. Laws*, to prevent a mechanic's lien taking precedence over his

*Section 3672: "Every building or other improvement * * * constructed upon any lands with the knowledge of the owner, or the person having or claiming any interest therein, shall be held to have been constructed at the instance of such owner or person having or claiming any interest therein; and the interest owned or claimed shall be subject to any lien filed in accordance with the provisions of this act, unless such owner or person * * * shall give notice that he will not be responsible for the same."

mortgage. But this section applies only to the owner of the land, and has no application to a mortgage lienholder: *Williams v. Santa Clara Mining Co.*, 66 Cal. 193 (5 Pac. 85).

AFFIRMED.

Argued 20 April; decided 20 June, 1898.

COOS BAY RAILROAD CO. v. SIGLIN.

[58 Pac. 504.]

1. REPLEVIN—EVIDENCE TO DISPROVE OWNERSHIP.—The minutes of the board of directors of a railroad company showing a contract with its manager in his individual capacity for the construction of its road are admissible to impeach the company's title to chattels in an action to recover them from an officer who seized them under execution against the manager, over the objection that the contract was not within sufficient proximity in point of time to the date of the purchase to create the presumption that the contractor was still working thereunder at the time of the purchase, where the minutes of subsequent meetings are introduced showing that up to and subsequent to the commencement of the action both parties treated the contract as subsisting.
2. INSTRUCTIONS—USURPING PROVINCE OF JURY.—It is not improper for a court, in order to attract the attention of the jury to a specific point of law, to tell them that there is evidence tending to show a certain controverted fact: *State v. Brown*, 28 Or. 147, followed on this point.
3. LEVY BY SEIZURE—GAERNISHMENT.—The mere piling of rails on the wharf of a railroad company by the contractor for the construction of the road, does not constitute such a possession of them by the company as will prevent a valid levy upon them by actual seizure as the property of the contractor, if they in fact belong to him.
4. INSTRUCTION—CONFLICTING EVIDENCE.—Where the evidence as to plaintiff's ownership of the property in litigation is conflicting, it is error to require the jury to find the title to the property in such plaintiff.
5. REPLEVIN—FORM OF JUDGMENT.—An alternative judgment for the sheriff in an action against him to recover property seized under execution, which was taken from him at the commencement of the proceeding, should be for the full value of the property, though it exceeds the amount due on the execution, where a third person is found to be the general owner.

From Coos: J. C. FULLERTON, Judge.

Replevin—or, as the Oregon Statutes term it—claim and delivery, by the Coos Bay, Roseburg & Eastern Rail-

road and Navigation Company against Z. T. Siglin, in which defendant had judgment, and plaintiff appealed.

AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. James Watson Hamilton*.

For respondent there was a brief and an oral argument by *Mr. S. H. Hazard*.

MR. JUSTICE WOLVERTON delivered the opinion.

This is an action to recover the possession of nine hundred and twenty-four steel T rails, with fishplates to match, and a lot of bridge bolts and washers. The defendant was the sheriff of Coos County, and, as such sheriff, justifies his possession and holding by reason of having seized the same as the property of one R. A. Graham, by virtue of an execution duly issued upon a certain judgment of the circuit court for said county in favor of one Miller, and against the said Graham. It is alleged, in effect, that, at the date of the levy, Graham was the owner of the property in question, but that, being indebted to Miller and others in large amounts, he entered into a conspiracy with the plaintiff to defraud his said creditors, whereby plaintiff was to claim and hold said property for the use and benefit of Graham, and that plaintiff now claims and holds the same, in pursuance of said conspiracy, in secret trust for the said Graham, with intent to enable him to so cover up and dispose of such property as to hinder, delay and defraud his said creditors, but that it has no interest therein whatever. For its source of title, plaintiff claims that it purchased the property through Graham, its manager, from the Peninsular Railway Company of

Lower California; and that J. D. Spreckels Bros. & Co. advanced the funds necessary to the purchase, under an agreement that plaintiff would issue to the said Spreckels Co. certain of its bonds to secure them in the repayment of the amount so advanced. The theory of defendant is that Graham, while it is conceded he was the manager of the plaintiff company, was also under contract with plaintiff to build and construct certain portions of its road, and to that end agreed to furnish all work, labor and material necessary for the purpose, and in consideration thereof was to receive from the plaintiff an assignment and transfer of all its subsidies, together with the mortgage bonds of the company at the rate of \$25,000 per mile; that the rails in question were purchased by Graham upon his own account, for use by him in the construction of said road under his contract, and not for the plaintiff, and that plaintiff never owned nor possessed any interest in them whatever.

1. To establish its case, plaintiff produced one F. S. Samuels, who testified, in substance, that he was the manager of a large portion of J. D. Spreckels Bros. & Co.'s business; that said company authorized the purchase of the rails with its own funds for, and directed the shipment thereof to, plaintiff; and that the funds were advanced on the strength of the railroad company's securities. This was in the latter part of 1891, or first of 1892. Other evidence was produced tending to show the shipment of the rails direct to the railroad company, and an acceptance of them by it upon its wharf in Marshfield, Oregon. When plaintiff had rested, the defendant offered, and the court admitted, over plaintiff's objection, the minutes of a meeting of the board of directors of the railroad company, held August 19, 1890, showing the election of its officers, the adoption of by-laws, the appointment of R. A. Graham as manager,

and the entering into and execution of a contract between the company and Graham for the construction of its road, a copy of which being spread upon the minutes, its terms and conditions were thereby disclosed. The objection to the introduction of these minutes was that they do not tend to impeach the title of plaintiff, because the making of the contract was not within sufficient proximity, in point of time, to the date of the purchase, to create a presumption that Graham was still working under the contract, in the absence of a showing that they were purchased by him with a purpose of fulfilling the contract. Minutes of subsequent meetings of the board were introduced, tending to show that up to and subsequent to the commencement of the action both parties were treating the contract as subsisting and operative, and were proceeding in the discharge of its terms and conditions without change or modification; and those were also admitted over like objections. There was evidence produced by the defendant tending to show that Graham purchased the rails upon his own account, and gave his promissory note for the purchase price, with certain bonds of the railroad company as collateral, and that they were shipped to Marshfield in his name, and marked with his initials. It is perfectly apparent that the minutes were pertinent to show the business relations existing between the plaintiff corporation and Graham, from the time of the inception of the contract up to and subsequent to the purchase of the rails, and their treatment of the contract as in force and effective during the while, as they serve to throw light upon the contested question whether Graham purchased as manager for the road or upon his own account in furtherance of the execution of the contractual conditions upon his part. Besides, the further testimony tending to establish the direct purchase of the rails by Graham

individually, for use in the fulfillment of his engagements under the contract, sufficiently answers the very objections taken. Aside from this, the answer laid the foundation for a wide range of investigation, and the testimony was not a whit without its scope, and tended directly to the establishment of defendant's theory of the case, and, therefore, indirectly, to the impeachment of plaintiff's title, all of which was proper matter for the jury. There was no error in the admission of these minutes, and the objections thereto were properly overruled.

2. In this connection we will advert to an exception taken to a portion of the court's charge to the jury, as follows: "There is some evidence in this case tending to show that said Graham was at said time engaged in the construction of a railroad for plaintiff, under a contract which required him to furnish all the material of every kind and description that entered into the construction of said railroad; and there is some evidence tending to show that the purchase price of the property described in the complaint was paid by R. A. Graham, and not by the plaintiff." The objections assigned to the instruction are, first, that there was no evidence in the record—and we have all the evidence here—tending to show what the court asserts; and, second, that it was improper for the court to tell the jury that there was evidence tending to show certain facts pertinent to the issues. Upon the first proposition there can be no question but that the court is sustained by the record; and upon the second it is sustained by the case of *State v. Brown*, 28 Or. 147 (41 Pac. 1042). The language was used to attract the attention of the jury to the specific point of law upon which the court desired to instruct. It did not tell them that the fact or facts had been established, but that there was evidence tending to their estab-

lishment, and for that reason the instruction became necessary for their guidance in passing upon the question. If it may be said that the method of attracting the jury's attention to the direct point upon which the court was about to instruct is subject to criticism, it could have done no harm in the present case, as the jury no doubt fully understood from the instruction their duty in the premises.

3. Exceptions were also taken to the following instruction, viz.: "If you should find from the evidence that the rails, at the time the levy was made, were in the possession of the railroad company, then the sheriff would have no right to take possession as the property of Graham, but the mere piling of the rails upon the wharf of the railroad company would not constitute such a possession of them by the railroad company as would prevent the sheriff from making a valid levy upon them as the property of Graham, if you find that the rails were in fact the property of Graham." This instruction was given in view of a question made at the trial whether the sheriff should not have garnisheed the railroad company, instead of taking the property into his custody, and involved the further question whether the property was then and there in the possession of Graham or the company. As has been stated, there was evidence tending to show that the rails were purchased by Graham, and shipped to him, and received by him at the wharf at Marshfield, Oregon, and it was a question for the jury to decide as to which of these parties had the possession, in determining the legality of the levy. In view of the issue, the instruction was pertinent, and this disposes of the instruction touching the same matter asked by plaintiff and refused by the court.

4. Another assignment of error is based upon an instruction requested by plaintiff, as follows: "You are

instructed that the evidence in this case shows the general title of the property in dispute to be in the plaintiff, and you should so find in your verdict." The court refused this instruction, and properly so, because there was an issue in the case whether plaintiff or Graham was the general owner; and the testimony touching such ownership being conflicting, it became a question of fact for the jury to determine. The jury found, by their verdict, that R. A. Graham was, at the time of the levy, the owner of the property, and that defendant acquired a special interest therein by virtue of such levy, and found the value of the entire property to be \$10,000.

5. This brings us to the final question touching the controversy. The plaintiff having taken the property from the defendant at the institution of the action, the judgment was entered for the return of the property to the defendant, and, if a return could not be had, then for its entire value as assessed by the jury. It is insisted that it was error to have so entered the judgment, and that the alternative judgment should have been for the value of defendant's special property or interest therein only, which would be measured by the amount he was directed to make under the execution. The exact contention is stated by counsel as follows: "Where the defendant has but a limited interest, which is less than the value of the property, judgment in his favor should not be for the full amount, unless he is liable to the general owner, but should be only for the amount of his special interest." The rule governing under statutes similar to ours appears to be this: "If the pleadings and evidence show that the party recovering is the general owner, or is a bailee, and connects himself with the general owner, the jury are to assess the full value of the goods. If they show that he has only a special property in the goods, and the general property is in the other party,

they are to find, * * * as the value of the property, only the value of the interest of the party recovering,"—quoting from *Booth v. Ableman*, 20 Wis. 23 (88 Am. Dec. 730). See, also, *Bleiler v. Moore*, 88 Wis. 438 (60 N. W. 792); *Shahan v. Smith*, 38 Kan. 474 (16 Pac. 749); *Witkowski v. Hill*, 17 Colo. 372 (30 Pac. 55). Now, under this rule, if it had been found that plaintiff was the general owner of the property, the alternative judgment of value should have been for the amount of the special interest only. But the jury has found that Graham, and not the plaintiff, was the general owner; and the defendant, having taken the property from Graham, is answerable to him for its disposal. Plaintiff occupies the position of a bailee, and if there is any overplus of the property after satisfying the execution, he must return it to Graham, from whom he took it. If he fails in obtaining a return of the property from the plaintiff, he still would be accountable for its full value to Graham, and it would be unjust and inequitable to permit him to recover only a part of its value. Such a rule would greatly imperil the sheriff in the discharge of his duties. The principle is determined by the case of *Dean v. Lawham*, 7 Or. 422, which is applicable here, and the judgment of the court below will therefore be affirmed.

AFFIRMED.

Argued 10 November; decided 5 December, 1898.

REINSTEIN v. ROBERTS.

[55 Pac. 90.]

1. CHATTEL MORTGAGE AS EVIDENCE OF OWNERSHIP.—A chattel mortgage after default is admissible in evidence to support an averment of ownership and right of possession in the mortgagee in a complaint in replevin by the latter, since a chattel mortgagee then has a qualified ownership, and may prove it under an allegation of absolute ownership: *Moorhouse v. Donaca*, 14 Or. 490; *Case Machine Co. v. Campbell*, 14 Or. 460, and *Marquam v. Sengfelder*, 24 Or. 2, approved.

24	87
38	516
34	87
42	239
34	87
43	570
43	575
43	566
34	87
45	498
34	87
48	560

2. DESCRIPTION IN CHATTEL MORTGAGE—PAROL EVIDENCE.—A chattel mortgage on a crop of hops described as growing upon three parcels of land situated upon a part of a donation land claim which is referred to by the name of the claimant, the number of the notification and claim, and its township and range, is sufficiently definite in description, as between the parties thereto, to let in parol testimony to identify the property and prove the ownership, in view of the fact that under the Oregon donation laws a person can obtain but one gift of land from the government, and a partial description by metes and bounds may be regarded as surplusage.
3. PAROL EVIDENCE—CHATTEL MORTGAGE.—As between the mortgagor and mortgagee of personal property, and also as between the mortgagee and a third person who has succeeded to the mortgagor's interest with actual notice of the mortgage, parol evidence is admissible to identify the property intended to be covered thereby: *Sommer v. Island Mercantile Co.*, 24 Or. 214, applied.

From Polk: GEO. H. BURNETT, Judge.

Action by M. Reinstein against G. A. Roberts and others. From a judgment in favor of defendants, plaintiff appeals.

REVERSED.

For appellant there was a brief and an oral argument by *Messrs. J. J. Daly and Austin F. Flegel*.

For respondents there was a brief over the names of *Reuben P. Boise and Sibley & Eakin*, with an oral argument by *Messrs. Reuben P. Boise and J. A. Sibley*.

MR. JUSTICE MOORE delivered the opinion.

This is an action to recover one hundred and ninety-two bales of hops, or the value thereof in case delivery could not be had, and damages for their detention. After the action was commenced, plaintiff obtained possession of one hundred and forty-five bales of the property sought to be recovered upon his claim for the immediate delivery thereof. The defendants denied the material allegations of the complaint, and alleged that they were the owners and entitled to the possession of the hops so obtained by plaintiff, which were of the reasonable value

of \$1,721.24, and that by reason of the unlawful taking they had sustained special damage in the sum of \$500. These allegations of new matter having been denied, a trial was had, at which plaintiff, to sustain the allegations of the complaint, offered in evidence a chattel mortgage executed by defendants to him September 9, 1895, which recited a loan of \$250, and guaranteed such further advances as might be necessary, not exceeding the sum of \$1,750, in consideration of which they covenanted to care for and cultivate during the year 1895 the crop of hops growing upon three parcels of land in Polk County, described as follows: "All three pieces situated upon that part of the donation land claim of James Morris and Sarah Morris, his wife, notification No. 115, and claim No. 39, in township 7 south, range 4 west, Willamette Meridian; running thence west 2.59 rods; thence north 80 rods to the place of beginning, containing one hundred and twenty-nine and thirty-five one-hundredths acres, more or less; fifty-three acres being set out to hops." The defendants also covenanted to harvest, dry, and bale said hops, and, not later than October 5, 1895, deliver the same to plaintiff, that he might dispose of them, and reimburse himself out of the proceeds for advances, charges, and expenses, including a commission of one cent per pound upon the entire crop. Said mortgage was conditioned that if defendants kept and performed the covenants therein it should be void. The court sustained an objection to the introduction of the mortgage in evidence on the ground that it was incompetent, irrelevant, and immaterial, to which ruling an exception was saved. The court also refused to permit plaintiff to answer the following questions, viz.: "Are you acquainted with the crop of hops described in the instrument just offered in evidence?" "Where were the said hops growing when you entered into this contract?"—to which

action plaintiffs' counsel excepted. In submitting the cause to the jury, the court instructed them to find that the defendant's were entitled to the recovery of the hops taken from them by plaintiff, or, if delivery thereof could not be had, that they recover from him the sum of \$1,671.15, as the value thereof, to which charge an exception was saved; and, judgment having been rendered on the verdict returned in accordance with such instruction, plaintiff appeals.

1. The action having been commenced after the expiration of the time in which defendants agreed to deliver the hops, and the complaint having alleged that plaintiff was the owner, and entitled to the possession thereof, the questions presented for consideration are whether a chattel mortgage, after default, is evidence of the mortgagee's ownership of the property therein described; and, if so, was the mortgage in question, as between the parties thereto, sufficiently definite in description to let in parol testimony to identify the property and prove the ownership? The law is settled in this state that a chattel mortgage is a conditional sale of personal property, and that after a breach of the conditions the mortgagee has a qualified ownership of the property hypothecated to him as security for the payment of a debt, or the performance of an obligation: *Case Machine Co. v. Campbell*, 14 Or. 460 (13 Pac. 324); *Hembree v. Blackburn*, 16 Or. 153 (19 Pac. 73); *Marquam v. Sengfelder*, 24 Or. 2 (32 Pac. 676). It has also been held that, under an allegation of absolute ownership, the mortgagee of personal property upon default of the mortgagor may maintain an action for its recovery, and claim immediate delivery thereof in such action: *Moorhouse v. Donaca*, 14 Or. 430 (13 Pac. 112). It is manifest from these decisions that the complaint stated facts sufficient to constitute a cause of action, and that, a breach of the conditions of the

mortgage having occurred, the instrument is sufficient proof of the mortgagee's qualified ownership of the property therein described.

2. The decision of the case must, therefore, depend upon a consideration of the sufficiency of the description of the property mentioned in the mortgage. In *Spaulding v. Mozier*, 57 Ill. 148, suit was instituted to correct a mistake in the description contained in a chattel mortgage of property which was located in lot 1, instead of lot 11, in a certain block in the village of Highland Park, Illinois; but it was held that the mistake complained of was wholly immaterial, and the court refused to grant the relief which was sought, Mr. Justice Scott saying: "That part of the mortgage that designates the property as being then situated 'on lot one, block number eighteen, in the Village of Highland Park,' may be rejected as surplusage, and without it the description of the property conveyed is perfect." In *Baldwin v. Boyce*, 152 Ind. 46 (51 N. E. 334), a chattel mortgage described the property intended to be affected thereby as, "all and singular, the restaurant and hotel furniture and fixtures located in and situated in and about the first, second, and third stories of No. 313 East Main Street, consisting of the following articles," etc., without referring to the town, county, or state in which said street was situated. The mortgage recited, however, that the mortgagor, of Delaware County, in the State of Indiana, mortgages to Mary Baldwin, etc.; that the property was in the mortgagee's possession, where it was to remain until the note secured by the mortgage should mature; and it was held that the property was bound by the mortgage, even in the hands of one who had purchased the same from the mortgagor. It will be observed, from an examination of the description of the land upon which the hops

were stated to have been growing in 1895, that it was the donation land claim of Jesse Morris, in township 7 south, of range 4 west, of the Willamette Meridian, in Polk County, Oregon. Under the donation laws of Oregon, a person could obtain but one gift of land from the government; and, this being so, if there were more than one Jesse Morris who had obtained a donation, the number of the notification and claim would enable a surveyor to locate the premises; and hence the partial description by metes and bounds given in the mortgage may be regarded as surplusage.

3. The rule is quite general that, as between the mortgagor and mortgagee of personal property, and also as between such mortgagee and a person who has succeeded to the interest of the mortgagor with actual notice of the conditional sale, parol testimony is admissible to identify the property which was intended to be given as security: *Cobbey*, Chat. Mortg. § 188; *Jones*, Chat. Mortg. § 64; *Sommer v. Island Milling Co.*, 24 Or. 214 (33 Pac. 559); *Cummings v. Tovey*, 39 Iowa, 195; *Clapp v. Trowbridge*, 74 Iowa, 550 (38 N. W. 411); *Plano Mfg. Co. v. Griffith*, 75 Iowa, 102 (39 N. W. 214); *Am. Well Works v. Whinery*, 76 Iowa, 400 (41 N. W. 53); *Dodson v. Dedman*, 61 Mo. App. 209; *Dodge v. Potter*, 18 Barb. 193; *Goulding v. Swett*, 13 Gray, 517; *Gurley v. Davis*, 39 Ark. 394; *Ranck v. Howard-Sansom Co.*, 3 Tex. Civ. App. 507 (22 S. W. 773); *Duke v. Strickland*, 43 Ind. 494; *Ebberle v. Mayer*, 51 Ind. 235; *Burns v. Harris*, 66 Ind 536; *Tindall v. Wasson*, 74 Ind. 495; *Buck v. Young*, 1 Ind. App. 558 (27 N. E. 1106); *Koehring v. Aultman, Miller & Co.*, 7 Ind. App. 475 (34 N. E. 30); *Morris v. Connor*, 108 N. C. 321 (12 S. E. 917). Under this rule, we think the chattel mortgage in question contained, as between the mortgagors and mortgagee, a sufficient description to permit it to be

offered in evidence to prove plaintiff's qualified ownership of the hops, and that, as between the said parties, parol testimony was admissible to identify the property intended to be hypothecated; and, this being so, the court erred in refusing to permit the mortgage to be received in evidence, in not allowing plaintiff to identify the property, and in charging the jury to return a verdict for defendants, and hence it follows that the judgment is reversed, and the cause remanded for a new trial.

REVERSED.

Argued 29 November; decided 19 December, 1898.

MULTNOMAH COUNTY v. CITY RAILWAY CO.

[55 Pac. 441.]

MUNICIPAL CORPORATIONS—CONSTRUCTION OF STATUTE.—The power conferred by the legislature upon the Bridge Committee of the City of Portland to enter into such contracts as it might deem just with any line of street railway operating across the bridges contemplated by the act if it should find it necessary to do so in order to effect the agreement of purchase or lease, Laws, 1895, p. 421, § 15, authorized the committee to enter into an original contract with a street railway company for the use of the bridge. The statute was not intended to restrict the committee to negotiations for the cancellation of existing rights.

From Multnomah: E. D. SHATTUCK, Judge.

Action at law by Multnomah County against the City and Suburban Railway Company, wherein the defendant had judgment.

AFFIRMED.

For appellant there was a brief over the names of *Fenton, Bronaugh & Muir*, and *Dolph, Nixon & Dolph*, with an oral argument by *Messrs. Wm. D. Fenton and Chester V. Dolph*.

For respondent there was a brief over the name of *Dolph, Mallory & Simon*, with an oral argument by *Mr. Rufus Mallory*.

MR. JUSTICE BEAN delivered the opinion.

This is an action brought by the County of Multnomah to recover the sum of \$1,200, alleged to be due from the defendant, the City and Suburban Railway Company, for the use of Morrison Street Bridge, in the City of Portland, for the months of February and March, 1896. The facts out of which the controversy arose are as follows: The legislature of 1895 appointed a "Bridge Committee of the City of Portland," with authority to procure for it, by purchase or condemnation, the Morrison Street Bridge, a structure owned by the Willamette Iron Bridge Company; the Stark Street Ferry, owned by private parties; and the lease of the upper deck of what is known as the "Steel Bridge," owned by the Oregon Railway & Navigation Company, for the purpose of making them free for the use of the general public: Laws, 1895, p. 421. Section 15 of the act provides that "the bridge committee, in the name of said city, is hereby authorized, in case it can secure the said Morrison Street Bridge, or the upper deck of the said Steel Bridge, or the Stark Street Ferry, by agreement, and finds it necessary so to do in order to effect the agreement of purchase or lease, as the case may be, to enter into such contracts as it may deem just with any line or lines of street railway operated or to be operated over and across the said bridges or the said ferry." It is further provided that after the bridges and ferry shall be so acquired, and are ready for use, the possession and control thereof shall be transferred and delivered to the County Court of Multnomah County, which shall thereafter maintain and operate the same,

with power, among other things, "to establish rates for the use thereof by the street railway company, and other companies or corporations not entitled to the free use of the same." In pursuance of the power conferred upon it, the bridge committee, on July 3, 1895, purchased Morrison Street Bridge for the city; but the defendant, being at the time the owner of about seventy-five per cent. of the stock of the bridge company, and having an exclusive right to the use of the bridge for street railway purposes, it was found necessary to enter into an agreement with it by the terms of which it was to be permitted to use the bridge as part of its street railway system for the term of twenty years, at the monthly rental of \$150. The county court, however, upon assuming possession and control of the bridge, refused to recognize the validity of such contract, and made an order fixing the amount to be paid by the defendant for such use at \$750 per month, which the defendant refused to pay, and hence this action.

Waiving all questions of procedure, the real controversy between the parties to this litigation is whether the bridge committee had power to make the contract with the defendant company referred to; and this depends upon the construction to be given to section 15 of the act creating and defining the duties of such committee. The language of the section is undoubtedly broad enough to authorize such a contract, for it gives to the committee power, if it can secure the bridge by agreement, and finds it necessary in order to effect such agreement, "to enter into such contracts as it may deem just with any line, or lines of street railway operated, or to be operated, over and across the said bridge." But the contention for the plaintiff is that the purpose of the section was to enable the bridge committee, if it could agree with the owner of the bridge for its purchase, to deal

directly with the street railway company for the cancellation of any lease or franchise which it might have for the use of the bridge, so that an unincumbered title should pass to the city and under the control of the county court, and that the language of the statute should be so construed. But we are unable to concur in this construction. It seems to us that it would not only be contrary to the language of the section, but to its evident object. The general purpose of the act, of which it forms a part, was to enable the City of Portland to make the use of all the public bridges and ferries over and across the Willamette River, within the corporate limits, free to the general public. At that time the city owned the Madison and Burnside Street bridges and the Albina Ferry, which were free, but the other bridges and ferry were owned by private parties, who charged and collected tolls for the use thereof. To enable the city to relieve itself and its citizens from this condition of affairs, the act in question was passed, authorizing the committee named therein to procure the Morrison Street Bridge and Stark Street Ferry for the city, by purchase, if that could be done, and, if not, by condemnation proceedings, and to lease the upper deck of the Steel Bridge. At this time the defendant street railway company was the owner of about seventy-five per cent. of the capital stock of the corporation owning the Morrison Street Bridge, and had the exclusive right to use such bridge, and also the upper deck of the Steel Bridge, for street railway purposes. This condition of affairs was, no doubt, known to the legislature, and it was, therefore, aware that the interests of the defendant in the two bridges were such as practically to enable it to prevent the purchase of the one, or the lease of the other, without its consent. With that fact before it, the legislature evidently intended to authorize the committee, in case it should be otherwise unable to

secure the Morrison Street Bridge, or a lease of the upper deck of the Steel Bridge, to enter into such contract with the defendant as the committee might deem just. Such were the objects of the act, and such the powers conferred upon the committee. It is true the committee was not authorized to lease any property which it might acquire, but it was empowered to make such contracts with street railway companies as it might deem just, if necessary to enable it to acquire such property by purchase. Such being the construction we put upon the act, it necessarily follows that the contract in question was within the power of the bridge committee; and, as that is the only question for determination, the judgment of the court below must be affirmed, and it is so ordered.

AFFIRMED.

Argued 9 November; decided 5 December, 1898.

SCHOOL DISTRICT v. SCHOOL DISTRICT.

[55 Pac. 98.]

COLLATERAL ATTACK ON ORGANIZATION OF SCHOOL DISTRICT.—The legal existence of a public or governmental corporation, organized under color of law, and in the exercise of its legitimate powers, cannot be attacked except in a direct proceeding by the state for that purpose: *State ex rel v. Hulin*, 2 Or. 308, followed.

From Linn: HENRY H. HEWITT, Judge.

Mandamus by School District No. 115 against School District No. 54, to compel defendant, from which plaintiff was created by a division of district No. 54, to act with it and the superintendent of schools in dividing assets and liabilities. There was judgment for plaintiff, from which defendant appeals.

AFFIRMED.

For appellant there was a brief over the name of *Weatherford & Wyatt*, with an oral argument by *Mr. James K. Weatherford*.

For respondent there was a brief over the name of *Wright & Tussing*, with an oral argument by *Mr. Geo. W. Wright*.

MR. JUSTICE BEAN delivered the opinion.

This is a proceeding by mandamus brought by the plaintiff, a school district created out of territory formerly embraced within the boundaries of the defendant district, to compel the defendant to appoint some disinterested person to act with the county superintendent and a like person chosen by the plaintiff, as a board of arbitrators, to make an equitable division between the plaintiff and defendant of the assets and liabilities of the defendant district at the time of the organization of plaintiff, as provided in Subd. 4, Section 2590, Hill's Ann. Laws. The defense to the proceeding is that the plaintiff is not an existing corporation, because not legally created or organized, and is, therefore, not entitled to the relief sought. To prove its creation and organization, the plaintiff gave in evidence, over the defendant's objection, (1) an order of the superintendent of common schools, made and entered of record in his office on February 24, 1896, reciting that, by virtue of a petition signed by a majority of the legal voters of school district No. 54, filed in his office February 18, 1896, he had that day divided such territory into two districts, giving the boundaries of each, the new one to be known as "District No. 115," together with oral proof that the petition upon which the order of the superintendent purports to be based could not be found; (2) the minutes of a meeting of the voters of the new district, held on March 9, 1896, at which a board of directors and clerk were elected; (3) the record of an infactual joint meeting of the directors of both districts,

held March 17, 1896, for the purpose of dividing the school property; (4) the record of a meeting of the board of directors of the plaintiff, held on March 19, 1896, at which an arbitrator was chosen, to act with the superintendent, and an arbitrator to be appointed by the defendant, in the matter of the division of such property. The defendant's objections to the admission of this evidence may be summarized thus: First, the petition upon which the county superintendent assumed to act in creating the plaintiff district was neither introduced in evidence nor its contents shown by parol, and there was no proof that it was signed by a majority of the legal voters of the district; second, it was not affirmatively shown that the county superintendent, immediately after creating the new district, notified the taxable inhabitants thereof, or the directors of the old district, of such order, as required by law; and, third, there was no legal proof that notice to the citizens of the district to meet for the purpose of organization, and for the election of directors and clerk was ever given, as required by section 2596.

These objections are, in our opinion, not available to the defendant, because the law is well established that the corporate existence of a school district, or other public or governmental corporation, created and organized under color of law, and in the exercise of its corporate powers, cannot be attacked, except in a direct proceeding instituted by the state for that purpose: 1 Beach, Pub. Corp. § 55; 1 Dillon, Mun. Corp. § 43a; *State ex rel. v. Hulin*, 2 Or. 306; *Atchison, etc., R. R. Co. v. Wilson*, 33 Kan. 223 (6 Pac. 281); *In re Short*, 47 Kan. 250 (27 Pac. 1005); *Clement v. Everest*, 29 Mich. 20; *Trumbo v. People*, 75 Ill. 561; *People v. Trustees of Newberry's Estate*, 87 Ill. 41; *Voss v. School District*, 18 Kan. 467; *School District No. 25 v. State*, 29 Kan. 57; *District Township of Center v.*

Independent District of Lansing, 82 Iowa, 10 (47 N. W. 1033). Such organizations are the mere creatures and agents of the state, clothed with certain governmental powers, and their existence cannot be called in question in a mere collateral proceeding; "for," as said by Mr. Justice CAMPBELL, in *Clement v. Everest*, 29 Mich. 20, "it would be dangerous and wrong to permit the existence of municipalities to depend on the result of private litigation. Irregularities are common and unavoidable in the organization of such bodies, and both law and policy require that they shall not be disturbed except by some direct process authorized by law, and then only for very grave reasons." Now, when we apply this rule to the case in hand, it is apparent that the objections of defendant were not well taken. The statute authorizes the superintendent of common schools to divide any district of his county into two or more parts, for school purposes (Hill's Ann. Laws, § 2590, subds. 1, 2, and 3), and the proof shows an order of such officer, valid on its face, dividing the territory of the defendant district and creating the plaintiff. The plaintiff was thus created under color of law, and has since elected officers, and exercised corporate powers. Undoubtedly, therefore, it has a *de facto*, if not a *de jure*, existence, and, under the doctrine already stated, its validity cannot be questioned in this proceeding. The defendant itself, as a public corporation, is subject to legislative control, and holds the property which it refuses to divide with the plaintiff as a mere governmental agent for public purposes. So long as the state does not question the existence of the plaintiff corporation, the defendant cannot do so. It follows that the judgment of the court below must be affirmed, and it is so ordered.

AFFIRMED.

Argued 28 November; decided 5 December, 1898.

DIMMICK v. ROSENFELD.

[55 Pac. 100.]

1. JUDGMENT LIENS—AFTER ACQUIRED PROPERTY.*—Lands purchased through an agent who took the title in his own name, without the principal's knowledge or consent, and then conveyed to her, are not thereafter subject to execution on a prior judgment against the agent, since he had only the bare legal title without any interest in the property itself.
2. EXECUTION—RIGHTS OF CREDITORS.—Sections 150 and 283 of Hill's Ann. Laws place attaching or execution creditors on the same footing as a purchaser from the judgment debtor, but do not confer on them any superior advantages: *Rhodes v. McGarry*, 19 Or. 222, and *Meier v. Hess*, 28 Or. 599, cited.
3. COSTS—APPEAL.—Costs and disbursements, as a general rule, should be allowed the prevailing party in a suit in equity as well as in an action at law, but the trial courts are given a discretion in the matter by section 554 of our statutes, which will not be interfered with on appeal except for an abuse.

From Multnomah: LOYAL B. STEARNS, Judge.

Suit by Mert E. Dimmick against Sol. Rosenfeld and the sheriff to restrain the sale of plaintiff's real property on a judgment against one of plaintiff's grantors. Decree for plaintiff.

AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. A. King Wilson*.

For respondent there was a brief and an oral argument by *Mr. Robert C. Wright*.

MR. JUSTICE BEAN delivered the opinion.

This is a suit to enjoin a threatened sheriff's sale of real property. The complaint alleges that the plaintiff was at the time of the commencement of the suit, and

*NOTE.—The kindred question of the priority of judgment liens on after acquired property is fully considered in foot notes to the case of *Moore v. Jordan* 42 L. R. A. 209, 53 Am. St. Rep. 576.—REPORTER.

84	101
139	48
34	101
147	371
34	101
48	473

for a long time prior thereto had been, the owner in fee, and in possession of lot 12 in block 2 of Goldsmith's Addition to the City of Portland, and that the defendants Rosenfeld had caused such property to be levied upon and advertised for sale by the Sheriff of Multnomah County, under an execution issued on a judgment recovered by them against one R. E. Drake; that Drake never at any time had any right, title, or interest in or to such property, or any part thereof; and that such threatened sale, if consummated, will create a cloud upon plaintiff's title. The answer, after denying some of the allegations of the complaint, avers, in substance, that on September 4, 1890, the defendant Rosenfeld duly recovered a judgment against R. E. Drake for the sum of \$250, which was immediately docketed; that thereafter, and on December 10, 1891, Drake received and recorded a conveyance for the property in question from one Beatty, and on the following day conveyed it to his wife, who, in November, 1892, conveyed the same to the plaintiff; that thereafter, and on June 6, 1896, Rosenfeld caused an execution to issue on his judgment, and such property to be levied upon, without any knowledge, information or belief as to any claim, right, or equity therein, except as disclosed by the records. The reply put in issue certain allegations of the answer, and averred that on December 10, 1891, Margaret M. Drake, the wife of R. E. Drake, purchased the property referred to in the complaint, and paid the consideration therefor; but that her husband, who acted as her agent in making such purchase, took the deed in his own name, without her knowledge or consent; and that, immediately upon learning that fact, she caused him to convey the property to her by warranty deed, which was duly executed and recorded on the eleventh day of December, 1891; and that the only purpose of such deed

was to convey the legal title to Mrs. Drake, the true owner; and that she subsequently sold and conveyed the same to the plaintiff, who is now the owner thereof. Plaintiff had a decree, and defendants appeal.

1. The only question of importance in the case is whether the defendant's judgment against Drake, recovered in September, 1890, became a lien upon the property now owned by the plaintiff; and its solution depends upon whether Drake had a title to which the lien could attach during its passage through him from Beatty to Mrs. Drake. The court below found, upon testimony practically undisputed and uncontradicted, that the purchase of the property by Drake was made for his wife; that she paid the entire consideration, and that the deed was taken in his name, without her knowledge or consent; that, immediately upon being informed of that fact, she demanded that the title be made over to her, which was done on the next day. It is clear, therefore, that the conveyance from Beatty to Drake vested in him nothing but the bare, naked legal title, which he held in trust for his wife, which trust was voluntarily executed by his subsequent conveyance to her. In other words, he had no interest whatever in the property, but was a mere conduit, through which the legal title passed from Beatty to his wife, the real purchaser and owner. Under these circumstances, the authorities are quite uniform that a judgment against him would not become a lien upon the land. "As a general rule, unless otherwise provided by statute," says the court in *Meier v. Kelly*, 22 Or. 136 (29 Pac. 267), "a judgment lien only attaches to the actual and not the apparent interest of the judgment debtor in land, and is subject to all equities which were held against the land in the hands of the judgment debtor at the time the judgment was rendered, whether known to the judgment creditor or not. When called upon in a

proper case, courts of equity are always ready to protect the rights of those who hold such equities as against the judgment lien, and to confine the latter to the actual interest of the judgment debtor.' And in *Snyder v. Martin*, 17 W. Va. 276 (41 Am. Rep. 670), it is said: "Independent of any statute law, the lien of a judgment is a charge upon the precise interest which the judgment debtor has, and upon no other. The apparent interest of the debtor can neither extend nor restrict the operation of the lien so that it shall incumber any greater or less interest than the debtor in fact possesses. The judgment creditor has a charge on the interests of the defendant in the land, just as they stood at the moment the lien attached; therefore, though he seems to have an interest, yet, if he have none in fact, no lien can attach. The rights of the judgment lien owner cannot exceed those which he might acquire by a purchase from the defendant with full notice of all existing legal or equitable rights belonging to third persons.'" Many cases could be cited in support of this rule, but the following are deemed sufficient for present purposes: *Black*, Judgm. § 420; 2 *Freeman*, Judgm. § 373; *Brown v. Pierce*, 74 U. S. (7 Wall.) 205; *Atkinson v. Hancock*, 67 Iowa, 452 (25 N. W. 701); *Koons v. Mellett*, 121 Ind. 585 (7 L. R. A. 231, 23 N. E. 95); *Davenport v. Stephens*, 95 Wis. 456 (70 N. W. 661). The case last cited is directly in point, both upon the facts and the law. We conclude, therefore, that the defendant's judgment did not become a lien upon the land, because the judgment debtor never had any interest therein to which it could attach.

2. It is claimed, however, that by virtue of section 150* of the statute (Hill's Ann. Laws), which is made

*NOTE.—This section reads as follows: "From the date of the attachment until it be discharged or the writ executed, the plaintiff as against third persons shall be deemed a purchaser in good faith, and for a valuable consideration, of the property attached."—REPORTER.

applicable to levies under execution by section 283, the defendants' levy entitles them to the protection accorded to *bona fide* purchasers for value. But these sections of the statute were simply designed to place an attaching or execution creditor upon exactly the same footing as purchasers from a judgment debtor, and not to confer upon them any superior advantages: *Boehreinger v. Creighton*, 10 Or. 42; *Rhodes v. McGarry*, 19 Or. 222 (23 Pac. 971); *Meier v. Hess*, 23 Or. 599 (32 Pac. 755). And where, as in this case, the public records disclosed at the date of the levy that the judgment debtor had no title whatever to the property, an attaching or execution creditor stands in no better position by reason of his levy than a purchaser of the same premises direct from the judgment debtor. In either case the record is notice of the condition of the title. Suppose, for example, the defendants, in place of seizing this property under execution, had bought it from Drake, the judgment debtor; certainly, they could not claim to have obtained title thereto, because the record, of which they were charged with notice, disclosed that Drake had no title at the time which he could convey, and they are not entitled to any superior advantages on account of the levy under their execution.

3. The court below directed that neither party should recover costs, and from this decree plaintiff appeals. As a general rule, costs and disbursements should be allowed the prevailing party in suits in equity as well as actions at law, but the statute (section 554) has invested trial courts with a discretion in the matter, which will not be interfered with on appeal except for an abuse thereof: *Lovejoy v. Chapman*, 23 Or. 571 (32 Pac. 687); *Cole v. Logan*, 24 Or. 304 (33 Pac. 568); *Nicklin v. Robertson*, 28 Or. 278 (52 Am. St. Rep. 790, 42 Pac. 993); *Willamette Real Estate Co. v. Hendrix*, 28 Or. 485 (52 Am.

St. Rep. 800, 42 Pac. 514). Upon this record it does not appear that the trial court abused its discretion. The respondent will recover costs on this appeal.

There are several additional points made in the brief, but they are without merit. This is not a suit to correct a mistake in the deed from Beatty to Drake, nor to enforce a trust in favor of Mrs. Drake. It is simply a suit to restrain the threatened sale of the plaintiff's property under a judgment which is not a lien thereon, because the judgment debtor never had any interest therein to which it could attach.

AFFIRMED.

Decided 19 December, 1898.

YOUNG MEN'S ASSOCIATION v. CROFT.

[55 Pac. 439.]

AGREEMENT TO PAY MORTGAGE—DEEDS.—A grantee of mortgaged property who accepts a deed therefor reciting that he assumes and agrees to pay the mortgage debt is not personally liable therefor unless his immediate grantor was so bound*.

From Multnomah: LOYAL B. STEARNS, Judge.

This is a suit by the Young Men's Christian Association, of Portland, to foreclose a real estate mortgage and to recover a personal decree against a grantee of the premises, who had assumed and agreed to pay the mortgage debt, notwithstanding his immediate grantors were

*NOTE.—The authorities on this subject are collected in a note to *Jefferson v. Asch* (Minn.), 25 L. R. A. 275, and 39 Am. St. Rep. 618. See, also, the following authorities: *Rice v. Sanders* (Mass.), 8 L. R. A. at page 316, 23 Am. St. Rep. 804; *Gifford v. Corrigan*, 15 Am. St. Rep. 508, 6 L. R. A. 610; *Hare v. Murphy* (Neb.), 29 L. R. A. 851; *Green v. Stone* (N. J. Eq.), 55 Am. St. Rep. 577; *Blood v. Crew Levick Co.* (Pa.), 55 Am. St. Rep. 742; *Hicks v. Hamilton* (Mo.), 66 Am. St. Rep. 431; *Enos v. Sanger* (Wis.), 37 L. R. A. 862, 65 Am. St. Rep. 38. Examine also *Knapp v. Connecticut Mutual Life Insurance Co.* (Fed.), 40 L. R. A. 861, *McKay v. Ward* (Utah), 57 Pac. 1024.—REPORTER.

not personally liable therefor. The facts are that one M. W. Gay, on October 19, 1889, being the owner of lots 7 and 8, in block 111, in Grover's Addition to Portland, executed a mortgage thereon to one W. G. Register, to secure the payment of his promissory note for \$2,000, due in one year, with interest from said date at the rate of eight per cent. per annum, which note and mortgage on December 4, 1889, were assigned to plaintiff, which since that date has been, and now is, the owner and holder thereof; that on October 23, 1889, Gay conveyed said premises to Mary C. Hill and H. E. Bristow by a deed with warranty against all incumbrances except said mortgage, but they did not assume or agree to pay the debt thereby secured; that Mary C. Box—formerly Hill—and Thomas Box, her husband, and H. E. Bristow, on April 3, 1893, for the expressed consideration of \$4,800, conveyed said lots to the defendant H. M. Cake by a deed containing a covenant of warranty against all incumbrances except said mortgage, “which,” the *habendum et tenendum* clause thereof recites, “the said H. M. Cake assumes and agrees to pay;” that Cake, on June 18, 1894, conveyed said land to the defendant Mary E. Croft by a deed containing a similar covenant and exception, but she did not assume or agree to pay said debt. Default having been made in the payment of said note, this suit was instituted for the relief hereinbefore stated, and, the trial thereof resulting in a decree foreclosing said mortgage, and dismissing the suit as to the defendant Cake, plaintiff appeals.

AFFIRMED.

For appellant there was an oral argument by *Mr. Wallace McCamant*, with a brief over the name of *Snow & McCamant*, to this effect.

A vendee who assumes and agrees to pay a mortgage

on the land is personally liable for the mortgage debt, notwithstanding the fact that his vendor was not so liable: *Merriam v. Moore*, 90 Pa. St. 78; *Dean v. Walker*, 107 Ill. 540 (47 Am. Rep. 467); *Bay v. Williams*, 112 Ill. 91 (54 Am. Rep. 209, 1 N. E. 340); *Grand Island Ass'n v. Moore*, 40 Neb. 686 (59 N. W. 115); *Hare v. Murphy*, 45 Neb. 809 (64 N. W. 211, 29 L. R. A. 851); *Comstock v. Smith*, 26 Mich. 305; *Crawford v. Edwards*, 33 Mich. 354; *Rice v. Sanders*, 152 Mass. 108 (24 N. E. 1079, 8 L. R. A. 315, 23 Am. St. Rep. 804); *Hill v. Minor*, 79 Ind. 49; *Burke v. Abbott*, 103 Ind. 1 (1 N. E. 485, 53 Am. Rep. 474); *Fisk v. Clark*, 9 Utah, 94 (33 Pac. 248).

A contract of assumption of a mortgage is a contract to pay, and not simply a contract to indemnify: *Burbank v. Roots*, 4 Col. App. 197 (35 Pac. 275).

A party may sue on a contract made between two others for his benefit. The limitations to this doctrine have no application to a case where the plaintiff is a charitable corporation, or where a fund is left in the hands of the promisor for the fulfillment of his promise: *Baker v. Elgin*, 11 Or. 333 (8 Pac. 280); *Hughes v. Or. Ry. & Nav. Co.*, 11 Or. 437 (5 Pac. 206); *Schneider v. White*, 12 Or. 503 (8 Pac. 652); *Parker v. Jeffrey*, 26 Or. 186 (37 Pac. 712).

For respondent there was a brief and an oral argument by *Mr. William M. Cake*.

MR. JUSTICE MOORE, after stating the facts, delivered the opinion.

This appeal presents the single question whether the grantee of mortgaged premises, who accepts a deed thereto containing a recital to the effect that he assumes and agrees to pay the mortgage debt, is liable therefor

when his immediate grantor was not personally bound. The evidence tends to show that at the time Cake purchased the lots in question, he considered them worth about \$3,600; that he paid, on account of the purchase, the sum of \$150, and executed to Mary C. Hill and H. E. Bristow a deed of unincumbered real property, which he valued at about \$1,500; and from these facts it is argued by plaintiff's counsel that the mortgage debt formed a part of the consideration of Cake's purchase, and having, by his acceptance of the deed, assumed and agreed to pay the said debt, his grantors thereby created a fund for plaintiff's benefit, of which Cake was trustee, and, this being so, the law supplies the want of privity of contract between him and the mortgagor by the fiction of an implied promise, which a court of equity will enforce. Defendant's counsel insist, however, that, inasmuch as Mary C. Hill and H. E. Bristow were not personally liable for the payment of the mortgage debt, they did not become Cake's sureties by his assumption and agreement to pay it; and hence, as against him, they could not be subrogated by any payment they might make, and, as the mortgagee could take no better title than they possessed, it cannot recover a personal judgment against Cake upon his covenant.

It is impossible to reconcile the conflict of judicial utterance upon the question under consideration, but we believe the weight of authority supports the principle for which defendant contends. In *Parker v. Jeffery*, 26 Or. 186 (37 Pac. 712), the defendants Robinson Bros., having entered into a contract with the City of Portland for the construction of a sewer, stipulated that they "would pay all sums of money due at the completion of the work, or thereafter to become due, for material used in, and labor performed on, or in connection with, said

work," and to secure the faithful performance of this contract they executed a bond to the city, in which the defendants Jeffery and Bays joined as sureties. The plaintiff, having sold and delivered to Robinson Bros. material to be used in the construction of the sewer, and not having been paid therefor, commenced an action against said sureties to recover the amount so due him, and it was held that he could not recover, because it did not appear that the contract had been entered into directly and primarily for his benefit. To the same effect is the case of *Washburn v. Interstate Investment Co.*, 26 Or. 436 (36 Pac. 533, and 38 Pac. 620), in which BEAN, C. J., says: "The prevailing doctrine in this country undoubtedly is that, where one person, as a consideration or part consideration for an executed contract, promises another, for a consideration moving from him, to pay or discharge some legal obligation or debt due from such other to a third person, the latter, although a stranger to the consideration, and not an immediate party to the contract, may maintain an action thereon, if it was made directly and personally for his benefit."

In *Brower Lumber Co. v. Miller*, 28 Or. 565 (52 Am. St. Rep. 807, 43 Pac. 659), in construing a clause contained in a bond given to the City of Portland for the faithful performance of the stipulations of a contract for making a street improvement, it was held, in effect, that, inasmuch as the city was not liable to the persons who sought to take advantage of the condition of the bond, there was no consideration for the stipulation to pay for the material used in or the labor performed upon the improvement. The conclusion arrived at in that case seems to have been based upon the rule announced by Mr. Justice ALLEN, in *Vrooman v. Turner*, 69 N. Y. 280, in which he says: "To give a third party, who may derive a benefit from the performance of the promise, an

action, there must be—First, an intent by the promisee to secure some benefit to the third party; and, second, some privity between the two, the promisee and party to be benefited, and some obligation or duty owing from the former to the latter, which would give him a legal or equitable claim to the benefit of the promise, or an equivalent from him personally.” In *King v. Whitely*, 10 Paige 465, it was held that, where the grantor of mortgaged premises is not personally liable for the payment of the debt thereby secured, the person to whom he conveys the land by a deed, which recites that the grantee assumes the payment of the debt as a part of the consideration, is not liable to the holder of the mortgage for any deficiency that might exist upon a sale of the premises under a foreclosure of the mortgage. See, also, as illustrating this principle: *Trotter v. Hughes*, 12 N. Y. 74 (62 Am. Dec. 137); *Vrooman v. Turner*, 69 N. Y. 280; *Pardee v. Treat*, 82 N. Y. 385; *Garnsey v. Rogers*, 47 N. Y. 233 (7 Am. Rep. 440); *Carrier v. Paper Co.*, 73 Hun. 287 (26 N. Y. Supp. 414); *Spencer v. Spencer*, 95 N. Y. 353; *Carter v. Holahan*, 92 N. Y. 498; *Brown v. Stillman*, 43 Minn. 126 (45 N. W. 2); *Nelson v. Rogers*, 47 Minn. 103 (49 N. W. 526); *Jefferson v. Asch*, 53 Minn. 446 (25 L. R. A. 257, 39 Am. St. Rep. 618, 55 N. W. 604); *Crowell v. Hospital of St. Barnabas*, 27 N. J. Eq. 650; *Arnaud v. Grigg*, 29 N. J. Eq. 482; *Norwood v. De Hart*, 30 N. J. Eq. 412; *Mellen v. Whipple*, 1 Gray, 317; *Osborne v. Cabell*, 77 Va. 462; *Keller v. Ashford*, 133 U. S. 610 (10 Sup. Ct. 494); *Morris v. Mix*, 4 Kan. App. 654 (46 Pac. 58); *New England Trust Co. v. Nash*, 5 Kan. App. 739; *Ward v. De Oca*, 120 Cal. 102 (52 Pac. 130); *Hicks v. Hamilton*, 144 Mo. 495 (66 Am. St. Rep. 431, 46 S. W. 32).

Where the grantor is in equity bound to pay the debt as his own, the covenant of his grantee to discharge the

obligation constitutes a promise made for the benefit of the holder of the mortgage, which he may enforce, although the primary object of the grantor in exacting the covenant was to protect himself against his personal liability for the debt, which was a charge upon the mortgaged premises: *Burr v. Beers*, 24 N. Y. 178 (80 Am. Dec. 327); *Pardee v. Treat*, 82 N. Y. 385; *Biddel v. Brizolara*, 64 Cal. 354 (30 Pac. 609); *Williams v. Naftzger*, 103 Cal. 438 (37 Pac. 411).

In Pennsylvania, however, a different conclusion has been reached by the courts, which hold that a grantor, although not personally liable for the payment of a mortgage debt, may direct how the purchase money shall be paid; and, if the grantee of the premises agrees to pay according to such directions, he will be liable on his covenant: *Merriam v. Moore*, 90 Pa. St. 78. The rule adopted in Pennsylvania and some other states seems to be founded on the maxim that "equity regards as done what ought to be done," the application of which treats the land purchased as money, and the grantee, having agreed, as a part of the consideration, to pay the debt, is liable on his covenant to the holder of the mortgage for the faithful disposition of the fund which has been placed in his hands by the grantor for the purpose of discharging the incumbrance. If this theory be correct, and the mortgagee has a claim in equity upon the fund, it would seem to follow, from the adoption of the maxim, that a conveyance of the legal title must necessarily discharge the mortgage, and the holder thereof, having lost his lien thereby, is obliged to resort for indemnity to the fund which takes the place of his security. The transfer of the title to the premises, however, does not discharge the mortgage thereon; and, the holder of the lien not having parted with his security nor incurred any loss in consequence of the conveyance, it would seem to

follow that he could have no claim whatever against the grantee who had assumed and agreed to pay the mortgage debt. When default is made in the payment of said debt, the incumbrance on the premises remains intact, and, this being so, the land was never converted into money, and the theory that the purchase price in the hands of the grantee constitutes a fund for the purpose of discharging the incumbrance is unfounded; thus showing that the maxim involved is inapplicable.

A conveyance of mortgaged land by a grantor who is not personally liable for the payment of the debt thereby secured, is not equivalent to remitting money to another with a request that he pay it over to the holder of the mortgage in satisfaction of the incumbrance, in consideration of which the grantee assumes and agrees to pay such debt. The error in the conclusion, by which the grantee under such circumstances is held personally liable on his covenant, seems to lie in the adoption of theory as the major premise, instead of basing the reasoning upon the facts involved. If the grantor, however, is personally liable for the payment of the mortgage debt, it is but reasonable to suppose that when he conveys the premises, which are subject to the lien, he would seek indemnity for his own benefit, and insist that the person to whom he sold the land should assume and agree, as a part of the consideration, to pay the debt which was a charge thereon, and the grantee, having accepted a deed poll containing such a covenant, becomes personally liable for the payment of said debt; but this covenant must necessarily inure to the grantor for whose benefit it was made, rather than to the holder of the mortgage, who has given no consideration whatever for the additional assurance which he thus obtains by reason of the grantee's covenant. In foreclosing the mortgage such grantee is

a necessary party in order to bar his equity of redemption, and the court, having obtained jurisdiction of his person, will, in order to avoid a circuitry of remedies, enforce his covenant, not for the benefit of the holder of the mortgage, but to protect the grantor from any personal judgment that may be rendered against him: *Osborne v. Cabell*, 77 Va. 482. Mary C. Hill and H. E. Bristow, not being personally liable for the payment of said debt, were not benefited by Cake's covenant, and, if any benefit was intended to be derived therefrom, plaintiff must have been the recipient thereof; but, under the recent decisions of this court, which we think are founded in reason and supported by the weight of authority, something more than an intended benefit is required to give force to the implied promise, and, as no personal debt was due Cake's grantors, he incurred no personal liability to plaintiff by his covenant, and hence it follows that the decree is affirmed.

AFFIRMED.

Decided 14 September; rehearing denied 19 December, 1898.

HOLT v. IDLEMAN.

[54 Pac. 279.]

AUTHORITY OF ATTORNEY AFTER DEATH OF CLIENT.*—Jurisdiction of an appeal cannot be acquired by the admission of service of notice of appeal by the attorney of a party who died prior to such admission, where the attorney had not been retained by the personal representatives of the deceased, who had been substituted, for the reason that the death of a client pending an action or proceeding terminates the authority of the attorney, and the subsequent continuance of the suit by the attorney, in the name of the representatives, without their consent, is unwarranted.

*NOTE.—The following annotated cases have notes on Revocation of an Attorney's Authority by Death of the Client: *Moyle v. Landers*, 12 Am. St. Rep. 22-23; *Drummond v. Crane*, 23 L. R. A. 710, 711.—REPORTER.

From Clackamas: THOS. A. McBRIDE, Judge.

Motion to dismiss appeal.

DISMISSED.

Mr. A. M. Cannon for the motion.

Mr. F. T. Griffith contra.

PER CURIAM. This is a motion to dismiss an appeal. The transcript shows that on February 8, 1893, the County Court of Clackamas County admitted to probate an instrument purporting to be the last will and testament of Matilda D. Holt, deceased, and issued letters testamentary to C. M. Idleman, the person named in said will as the executor thereof, who qualified and entered upon the discharge of the duties of said trust; that on February 20, 1896, said court, upon the petition of Thomas Holt, surviving husband of the testator, found that said will was void, and revoked the order admitting it to probate, and appointing an executor thereof. From this decree the excutor appealed to the circuit court of said county; but on October 15, 1896, and before the appeal came on for hearing, Thomas Holt died intestate, and the County Court of Linn County appointed Grant Holt administrator of his estate. On May 3, 1897, the circuit court, upon a trial of the cause, affirmed the decree appealed from; but on June 2 of that year, upon motion of the executor and suggestion of the death of Thomas Holt, and the appointment of an administrator of his estate, the decree of affirmance was vacated, Grant Holt substituted as contestant, and the decree of the county court reaffirmed. From this latter decree the executor attempts to appeal, and relies upon the following certificate, indorsed upon the notice of appeal, as the method of obtaining jurisdiction, to-wit: "Due service of the within notice and receipt of a copy thereof admitted, this fifteenth day of September, A. D. 1897, at Oregon City, Oregon. A. S. Dresser, of Attorneys for Contestant." Grant Holt, appearing by A. M.

Cannon, his attorney, moves to dismiss the appeal, contending that the death of Thomas Holt revoked the retainer of and discharged Dresser as one of his attorneys, and, not having been retained by Grant Holt, the latter is not bound by the admissions or appearance of Dresser in his behalf, and that the certificate relied upon is insufficient to confer jurisdiction. It appears from affidavits on file that Thomas Holt retained counsel residing in Linn County, and they engaged Mr. Dresser, an attorney of Clackamas County, who assisted at the trial of the cause in the county and circuit courts. The decree of the latter having been given without knowledge of the death of Thomas Holt, upon the suggestion of that event, Mr. Dresser, supposing he had authority to do so, appeared for Grant Holt, and consented to the several orders so made by the circuit court, and subscribed his name to the indorsement on the notice of appeal. The question presented challenges the jurisdiction of this court, the respondent contending that the provisions of the statute conferring it have not been observed.

Section 531, Hill's Ann. Laws, in prescribing the person upon whom and the manner in which notices shall be served, provides that "when a party is absent from the state, and has no attorney in the action or suit, service may be made by mail, if his residence be known; if not known, on the clerk for him. When a party, whether absent or not from the state, has an attorney in the action or suit, service of notice or other papers shall be made upon the attorney, if he reside in the county where the action or suit is pending, instead of the party, and not otherwise." Based upon this provision of the statute, it is contended that Dresser, being the only attorney of record residing in Clackamas County, was the proper and only person upon whom the notice of appeal could have

been served. True, the transcript shows that Dresser was the attorney for Grant Holt, and, no other attorney of record appearing for him, the certificate is equivalent to a service of the notice of appeal upon the attorney of record; but this would be insufficient to confer jurisdiction unless the attorney had authority to appear for the client whom he claimed to represent. The relation existing between an attorney and his client is governed in a great measure by the same rules which are applicable to other cases of agency. The client is the principal, and the attorney is the agent, clothed with apparent general authority in the management of the cause committed to him (Story, Ag. [9 ed.], § 24, and note); and the same learned author lays down the general rule that the death of the principal *ipso facto* revokes the power of the agent, unless his authority is coupled with an interest: Id. § 488. Applying this general rule to the relation of attorney and client, it is well settled that the death of the latter terminates the authority of the former, and that the subsequent continuance of the suit in the name of the representatives without their consent is unwarranted: Weeks, Attys. at Law (2 ed.), § 248; 3 Am. & Eng. Enc. Law (2 ed.), p. 328, and note 3; *Campbell v. Kincaid*, 3 T. B. Mon. 68; *Judson v. Love*, 35 Cal. 463; *Moyle v. Landers*, 78 Cal. 99 (12 Am. St. Rep. 22, 20 Pac. 241); *Gleason v. Dodd*, 4 Metc. (Mass.) 333; *Balbi v. Dubet*, 3 Edw. Ch. *418; *Beach v. Gregory*, 2 Abb. Prac. 203; *Putnam v. Van Buren*, 7 How. Prac. 31; *Risley v. Fellows*, 10 Ill. 531. It is conceded that Mr. Dresser had ample authority to appear for and represent Thomas Holt, and honestly believed he had authority from the attorneys of Grant Holt to represent and act for the latter; but an examination of the record before us fails to disclose any retainer of Mr. Dresser by Grant Holt, either directly, or by implication, which would authorize an ap-

pearance for him as the administrator of Thomas Holt's estate; and, such being the case, the notice of appeal was not served on an adverse party, and this court is without jurisdiction, in view of which the appeal is dismissed.

DISMISSED.

WOLVERTON, J., having formerly been of counsel in this case, took no part in its consideration.

34 118
147 126

Decided 5 December, 1898; rehearing denied 13 February, 1899.

HUGHES v. LANSING.

[55 Pac. 95.]

1. **MECHANIC'S LIEN A PRIVILEGE.**—The right to assert and perfect a mechanic's lien is a statutory privilege (*Brown v. Harper*, 4 Or. 89), and may be exercised or waived as the lienor may prefer.
2. **WAIVER OF LIEN.**—The right to a mechanic's lien under the Oregon statutes may be waived by express agreement, as well as by neglecting to perfect the lien within the statutory time.
3. **RELEASE OF LIEN—CONSIDERATION—UNILATERAL CONTRACT.**—A payment by the owner of a building to his contractor in reliance upon a waiver by a materialman of his right to a mechanic's lien, and a like payment by the contractor to the materialman, pursuant to an understanding to that effect when the waiver was signed, is a sufficient consideration to support the waiver, although it did not by its terms require any payment by the contractor.
4. **EFFECT OF A WAIVER.**—A waiver of all claims for materials furnished to the contractor, and used in certain buildings, is equivalent to a waiver of the right or privilege of claiming a lien therefor against the property.
5. **AGENT—STATUTE OF FRAUDS—CHARACTER OF LIEN.**—The right of preserving and enforcing a mechanic's lien is not an interest in land, and an agent's authority to act with reference to it need not be in writing.
6. **AUTHORITY OF AGENT.**—Where an agent has authority to represent the principal in carrying on the business of manufacturing and selling lumber and in filing mechanics' liens, the agent's waiver of a mechanic's lien for lumber sold by him for the principal is binding on the principal.
7. **MECHANIC'S LIEN—CONFUSED CLAIM.**—A claim of mechanic's lien is unavailing for any purpose where it is impossible to segregate the lienable items from the nonlienable ones in the account set forth in the claim of lien: *Williams v. Toledo Coal Co.*, 24 Or. 423, cited.
8. **PLEADING WAIVER.**—It is proper to plead a waiver of a mechanic's lien as such rather than to set up the matters and things which gave rise to it by way of estoppel.

From Marion: HENRY H. HEWITT, Judge.

Suit by John Hughes against E. Y. Lansing and others, in which the defendant J. C. Goodale answered, setting up a mechanic's lien against the defendant Lansing. There was a judgment for the defendant Lansing, from which the defendant Goodale appeals.

AFFIRMED.

For appellant there was a brief over the names of *Sherman, Condit & Park*, and *Tilmon Ford*, with an oral argument by *Mr. D. C. Sherman* and *Mr. Ford*.

For respondent there was a brief over the names of *Shaw, Hunt & McCulloch*, and *Geo. G. Bingham*, with an oral argument by *Mr. Bingham*.

MR. CHIEF JUSTICE WOLVERTON delivered the opinion.

This is a suit to foreclose a mechanic's lien. J. C. Goodale, a party defendant, answered, setting up a lien for lumber and materials furnished Plummer & Ault, which were used in several buildings constructed by them for the defendant E. Y. Lansing, as original contractors. Lansing defends against this claim of lien by alleging, in effect, that Goodale, for a valuable consideration, waived his right thereto. The facts upon which the alleged waiver is based are, in substance, as follows: Goodale was engaged in the manufacture and sale of lumber, and J. E. Baker was his agent, empowered to conduct and carry on the business at Salem, Oregon. Baker was authorized to sign checks, receipt for collections, and to act as his agent generally in and about the business, but had no written authority except for signing checks. He had always attended to the necessary steps for perfecting liens, and as such agent sold the lumber

and materials to Plummer & Ault, stated the account with them, and subsequently signed and verified the claim of lien for record. He admits the signing of the alleged waiver, but explains the manner of its procurement on cross-examination as follows: "I didn't see Mr. Lansing the day that was given—that receipt. In the first place, we gave that receipt to Plummer & Ault for the amount paid. Mr. Pugh wrote out that receipt, and sent it down there, and I supposed it was just a receipt that day, until I went out there, and Mr. Lansing said that it was a waiver, and that was the first knowledge I had of what I had signed." The paper referred to is in the following language: "Salem, Oregon, March 15, 1894. Mr. E. Y. Lansing, Salem, Oregon: This is to certify that we, the undersigned lumbering company, do and hereby waive all claims for lumber or other materials furnished by us to Plummer & Ault (contractors), used in the construction of the various buildings erected, or being erected, on your premises south of Salem. J. C. Goodale, per Baker." E. Y. Lansing testified touching the matter as follows: "Well, the way that came was this: These small buildings—this cottage, barn, poultry house—was done under a verbal contract; and I had no way of protecting myself; and I said, when the payment became due to Plummer & Ault—I think it was \$500 on this building. I said to Plummer— In fact, all my transactions were with Plummer—I said, 'I want you to bring'— I wanted to have those bills brought in; and he said, 'I will go and get your bills, and get you \$10,000 more bond, if you want it.' Mr. Pugh was present. He came back with this receipt: 'Received payment for all the lumber furnished on the Lansing job.' Mr. Pugh was there, and I said to him, 'That seems a very improper way to do;' and he said, 'I will have a waiver drawn;' and, on

his bringing me this waiver, I paid to Plummer & Ault the amount—I think it was \$500—on the contract.” Goodale’s account with Plummer & Ault shows a credit of \$500 of the same date as the alleged waiver. Pugh was charged, as Lansing’s architect, with the duty of overseeing the work as it progressed, and determining whether it was performed according to contract.

1. Upon this state of the case, it is contended, in behalf of Lansing, that Goodale waived his lien upon the buildings erected under contract with Plummer & Ault. That a party may waive his right to a mechanic’s lien upon structures for the building of which his labor or materials have been employed, is a matter about which there can be no controversy. The right to assert and perfect the lien given by statute is a privilege (*Brown v. Harper*, 4 Or. 89) which he may exercise or not, at his pleasure.

2. The statute (Hill’s Ann. Laws, § 3669) provides that a person furnishing materials, etc., shall have a lien, and sections 3673, 3675 and 3677, the manner of preserving and perpetuating it. Now, while the statute gives the lien in the first instance for a specified time, without the assertion of any formal claim therefor, it is made incumbent upon the lienor, if he intends to preserve his lien, to make a record of such intention, and to bring suit thereon within the time prescribed, and, if he does not observe these regulations, the lien must be deemed to have lapsed. And he may, if he so desire, waive his right or privilege of invoking the protection which the statute has accorded him as well, by direct and positive stipulations.

Whether the paper above set forth constitutes such a waiver on the part of Goodale, we shall now inquire. Lansing objected to making a certain payment upon his contract with Plummer & Ault for the construction of

one of the buildings until their accounts for material were brought in, so that he might protect himself against any claims of lien based thereon. Among others, was the account for lumber with Goodale. It appears that Plummer, of the firm of Plummer and Ault, with the purpose of satisfying Lansing, first obtained from Goodale, through Baker, a receipt showing "payment for all lumber furnished on the Lansing job." To this Lansing made objections as improper, and thereupon Mr. Pugh, the architect, said: "I will have a waiver drawn," and presently returned with the paper in question, and the \$500 was thereupon paid to Plummer & Ault. Upon the same day Plummer & Ault paid Goodale a like amount, which appears credited upon his account with them.

It is objected, first, that the purported waiver is a unilateral undertaking, without a corresponding obligation or promise upon the part of Lansing—that there was no consideration to support it, and for these reasons it is unavailing for the purpose in view in its procurement; and, second, that it is a transaction concerning real property in which the supposed agent, Baker, had no competent authority to bind Goodale, under the statute of frauds.

3. If there was a consideration supporting the alleged waiver, then it is plain, without elucidation, that it cannot be characterized as a unilateral contract or undertaking. Lansing was charged, under the statute, with the duty of seeing that whatever payments he made to Plummer & Ault before the expiration of thirty days after the completion of the buildings were distributed among the laborers and material men according to their several demands; otherwise he would have subjected himself to a second payment of the same installment: Hill's Ann. Laws, §§ 3678, 3679. Being charged with such duty, it was manifestly his right to require Plummer & Ault to

bring in the bills that they had contracted on account of the buildings constructed, or in course of construction. First, the receipt of Goodale was produced, which proved unsatisfactory to Lansing, and then came the alleged waiver, and, upon the faith of that instrument, the \$500 was paid to Plummer & Ault, and a like amount was paid by them to Goodale. Goodale undoubtedly understood, through Baker, that no money would be paid to Plummer & Ault by Lansing until the waiver was produced, else why should he first give a receipt showing "payment for all lumber furnished on the Lansing job," and, when that proved unsatisfactory, execute the alleged waiver? We think the payment of the \$500 to Plummer & Ault, under the conditions then present, and the fact that Goodale secured the benefit of such payment, was ample and sufficient consideration to support the waiver upon the part of Goodale. The writing was directed to Lansing, and, although the consideration was not named in the instrument, yet it was well understood that it was given upon condition that Lansing would part with the \$500, which he had good right to withhold for the present, and this undoubtedly constitutes a valuable consideration, and more especially as Goodale secured the benefit of the payment, or its equivalent. It was as though Goodale had requested the payment to be made to Plummer & Ault upon the condition of his relinquishment of his right to claim a lien for the lumber sold to them, and an acceptance on the part of Lansing by paying the money: See *Rand v. Grubbs*, 26 Mo. App. 591. This disposes, as we have intimated, of the unilateral feature claimed for the undertaking.

4. The waiver of all claims for lumber or materials furnished Plummer & Ault, and used in Lansing's buildings, is equivalent to the waiver of the right, or privilege, of claiming a lien therefor; for, if Goodale has no claim

for lumber or material sold to Plummer & Ault, and used in the buildings, he can have no right to file or claim a lien thereon, based upon his account with them.

5. As it concerns the second ground of objection, it is clear that the mere right or privilege of preserving and perpetuating a mechanic's lien upon buildings is not an interest in land. The right may be allowed to lapse, or its duration may be terminated by a payment of the demand without a release; and a written waiver, without the observance of any of the formalities of acknowledgement, etc., required touching instruments effecting land, will constitute an insuperable barrier to the enforcement of a lien thus waived, so that the essential characteristics attending instruments affecting real property are especially wanting, as it concerns the requisites of a valid waiver of the lienor's right or privilege. The identical question has been so decided in *Burns v. Carlson*, 53 Minn. 70 (54 N. W. 1055).

6. Mr. Baker, as the agent of Goodale, executed and filed the necessary claim to perpetuate the very lien the foreclosure of which Goodale is now insisting upon, and it appears that Baker had authority to this purpose, and to do and transact generally the business of Goodale in the manufacture and sale of lumber at Salem, Oregon. If he had such authority, it is clear that he was empowered, without any written authority thereto, to waive the right to said lien, as he undertook to and did do in the present instance.

7. It is claimed that some of the lumber obtained and used by Plummer & Ault in Lansing's building was furnished after the waiver, and that the lien for the price thereof could not be affected thereby. But, however that may be, it is utterly impossible to segregate the lienable items, if such they be, from the nonlienable items, in the account set forth in the claim of lien, which

is therefore unavailing for the purposes intended: *Williams v. Coal Co.*, 25 Or. 426 (36 Pac. 159, 42 Am. St. Rep. 799).

8. The instrument in question, being founded upon a valuable consideration, constituted, as we have seen, a waiver on the part of Goodale of his right or privilege to claim or assert his lien against the buildings constructed by Plummer & Ault for Lansing, and it was, therefore, proper for Lansing to plead it as such, instead of setting up the matters and things which gave rise to it, by way of estoppel: 28 Am. and Eng. Enc. Law, 534. Other questions were presented, but the conclusions here reached render their consideration unnecessary. The decree of the court below will be affirmed.

AFFIRMED.

Decided 24 October; rehearing denied 19 December, 1898.

FOSTE v. STANDARD INSURANCE COMPANY.

[54 Pac. 311.]

1. **PLEADING—AIDER BY VERDICT.**—In an action for commissions on premiums for insurance effected by plaintiff, the omission of the complaint to state whether any insurance was effected or whether any sum was collected is cured by a verdict, where the rate of commissions and the amount due for acting as defendant's agent is alleged.
2. **HARMLESS ERROR.**—Admission of the testimony of an agent as to the rate of commissions paid him by an insurance company is not prejudicial error in an action by him against the company for unpaid commissions where secondary evidence of the contract between them is not received, and a letter from the company's cashier containing a statement of the rate of commissions and the amount due the agent is admitted in evidence.
3. **EVIDENCE OF AGENCY.**—In an action by a solicitor against an insurance company to recover on a contract made with him by certain agents of defendant, it is competent to show that these agents delivered blank policies to plaintiff, received his returns from business written on these policies, and paid him part of the commission, as tending to explain and establish both the extent and character of the authority of sub-agents.
4. **IDEM.**—A letter from an insurance company to a person soliciting business for it, directing him, on account of the death of a person designated as "our late manager," to report his business to the company's cashier, is admissible upon the question as to what the authority was of the person so designated.

34	125
42	561
442	562

From Multnomah: HENRY E. MCGINN, Judge.

Action by H. D. Foste against the Standard Life & Accident Insurance Company, of Detroit, Michigan, to recover certain money. Defendant appeals from a judgment for the amount demanded.

AFFIRMED.

For appellant there was a brief over the name of *Emmons & Emmons*, with an oral argument by *Mr. Gustavus C. Moser*.

For respondent there was a brief and an oral argument by *Mr. William T. Muir*.

MR. JUSTICE MOORE delivered the opinion.

This is an action to recover money alleged to be due on account of insurance secured by plaintiff for the defendant. This action was here on a former appeal, and, the judgment having been reversed (*Foste v. Standard Insurance Co.* 26 Or. 449, 38 Pac. 617), the cause was remanded; whereupon plaintiff, by leave of court, amended his complaint, the material parts of which are as follows: "That heretofore, to wit, during the years 1891 and 1892, the plaintiff, at the special instance and request of defendant, performed for defendant labor and services as a special agent to solicit accident and life insurance for the defendant company, for which defendant promised and agreed to pay plaintiff a commission, to wit, a stipulated percentage in cash, namely, twenty per cent. of all moneys on premiums collected by defendant company on such insurance secured by plaintiff; that heretofore, on or about the thirtieth day of September, 1892, there was due and owing to plaintiff the sum of \$295.08 from defendant on account of work and labor

and services as special agent performed by the defendant as above set forth, in commissions earned on premiums collected by defendant, over and above all credits, which services were performed, at the request of the defendant, between the thirty-first day of July, 1891, and the thirtieth day of September, 1892, and which defendant promised and agreed to pay; that defendant has not paid same, nor any part thereof." A demurrer to this pleading, on the ground that it did not state facts sufficient to constitute a cause of action, having been overruled, defendant filed an answer thereto, specifically denying each allegation, except that it had not paid any part of the amount demanded. A trial being had, resulted in a verdict and judgment for plaintiff for the amount demanded, and defendant appeals.

1. It is contended that the complaint does not state facts sufficient to constitute a cause of action, which defect was not waived by answering over nor cured by the verdict. While a general verdict will not supply the omission of a material averment, it will establish every reasonable inference that is deducible from the pleadings: 28 Am. & Eng. Enc. Law, (1 ed.) 417; *Houghton v. Beck*, 9 Or. 325; *David v. Waters*, 11 Or. 448 (5 Pac. 748); *Weiner v. Lee Shing*, 12 Or. 276 (7 Pac. 111); *Bingham v. Kern*, 18 Or. 199 (23 Pac. 182). In *Booth v. Moody*, 30 Or. 222 (46 Pac. 884), Mr. Justice BEAN, in assigning a reason for the existence of the rule, says: "The extent and principle of the rule of *aider* by verdict is that whenever the complaint contains terms sufficiently general to comprehend a matter so essential and necessary to be proved that, had it not been given in evidence, the jury could not have found the verdict, the want of a statement of such matter in express terms will be cured by the verdict, because evidence of the fact would be the same whether the allegation of the com-

plaint is complete or imperfect. But if a material allegation, going to the gist of the action, is wholly omitted, it cannot be presumed that any evidence in reference to it was offered or allowed on the trial, and hence the pleading is not aided by the verdict." Applying this rule to the complaint under consideration, it will reasonably be inferred, from the averment therein of the rate of commission agreed to be paid and the amount due on account thereof, that plaintiff secured insurance for defendant, the premiums of which it collected, amounting to the sum of \$1,475.40; and hence the verdict cures any informality in the pleading, which, thus aided, supports the judgment.

2. The testimony tends to show that plaintiff was employed to solicit insurance for the defendant by its agents at Omaha, Nebraska. The letter, however, evidencing the agreement, plaintiff claimed to have been lost; but the proof of such loss, and of the efforts made by him to find the original, not appearing to be sufficient, the court refused to receive secondary evidence of its contents. This ruling of the court rendered it difficult for the plaintiff to prove the contract relied upon, and, after testifying that he was to be paid the rate of commission alleged in the complaint, he was permitted, over the defendant's objection and exception, to answer the following questions, to wit: "Do you know at what rate they paid you?" "What was the amount of compensation that they paid you, as far as you could ascertain from the amount sent you, and from commissions, in that way?" "What do you mean by cash business?"—in answering which he said, in substance, that on all insurance secured by him defendant had paid twenty per cent. of the premiums which it collected, and twenty-five per cent. of the premiums which were paid to him in cash when the policies were issued. It is argued that the testimony objected to

related to insurance obtained prior to the making of the contract relied upon, and that the rate of commission then paid was no evidence of the amount thereafter agreed upon. In view of the fact that secondary evidence of the agreement was ruled out, and that a letter, hereinafter referred to, containing a statement of the rate of commissions and amount due, was admitted in evidence, we cannot think defendant was prejudiced by the admission of the testimony of which it complains.

3. While the answer put in issue most of the allegations of the complaint, the real question litigated was the authority of the agents at Omaha, Nebraska, to bind the defendant by their agreements, its counsel contending that plaintiff should look to and rely upon the persons by whom he was employed, and not to their client, for the recovery which he sought. In order to show that these agents possessed the requisite authority, plaintiff testified that he received insurance policies from them, which he executed on behalf of the defendant; whereupon they paid him a part of the commission due on account of the service rendered. Referring to these agents he was asked, and, over defendant's objection and exception, permitted to answer, the following question: "They accepted the policies you wrote?" It is insisted that the court erred in permitting this question to be answered, because the acceptance of the policies was not in controversy, and did not tend to prove the existence of the contract sued upon. The acceptance of the policies was a circumstance from which the jury might have inferred that defendant held these agents out to plaintiff and the world as possessing sufficient authority to execute the contract in question, and, in our judgment, no error was committed in this respect.

4. It is contended that the court erred in permitting

plaintiff, over defendant's objection and exception, to offer in evidence a letter purporting to have been written to him from Detroit, Michigan, by one Stewart Marks, secretary of the defendant company, in which he refers to the death of one of the agents by whom plaintiff was employed, in the following language: "In consequence of the death of Mr. Geo. W. Hall, our late manager, you are instructed, until notice to the contrary, to report your business to Mr. Frank R. Lyon, cashier for this company, at its branch office, Bee Building, Omaha, Nebraska." This letter contained an admission that Hall had been defendant's "manager," and it was for the jury to say what was meant by the use of the term, for which reason it was admissible in evidence.

It is insisted that the court erred in permitting plaintiff to offer in evidence a letter purporting to have been written to him from Omaha, Nebraska, by "The Standard Life & Accident Ins. Co., F. Lyon, Cashier," inclosing a statement of plaintiff's account, claimed to have been with "Geo. W. Hall, Manager," showing that there was due plaintiff the sum of \$295.08. The writer, referring to Hall in this letter, said: "While our late manager doubtless made promises to you that he did not and could not fulfill, yet I believe he fully expected to do so when they were made, and used every effort to do so. That he did not was due to his overestimate of his ability to fulfill his promises, and not from any dishonest intention." This letter, like that of Marks, was admissible in evidence for the purpose of enlightening the jury as to the meaning of the phrase, "our late manager."

It is contended that the account inclosed in Lyon's letter having been stated, but not pleaded as such, the court erred in admitting it in evidence. The account had not been stated, for the evidence fails to show that

there had been a mutual examination of the claims by each of the parties, or that there was an agreement between them as to the correctness of the allowance or rejection of the respective items constituting the demand of each. At most, it was only an admission or acknowledgment of the amount due from Hall to plaintiff, and, as tending to corroborate his testimony, it was admissible in evidence.

It is also maintained that the court erred in failing to grant defendant's motion for a judgment of nonsuit, but, without quoting further from the testimony, we think the evidence introduced was sufficient to raise an inference of defendant's liability, and hence it follows that the judgment is affirmed.

AFFIRMED.

Argued 18 December, 1898; decided 3 January, 1899.

SMALL v. LUTZ.

[55 Pac. 529, 58 Pac. 79.]

1. **JURISDICTION OF EQUITY—CONSENT OF PARTIES.**—A bill in equity should be dismissed where the subject-matter of the litigation is entirely without the pale of equity, though both parties consent to a trial on the merits.
2. **TRIAL—LAW ACTION.**—Plaintiff brought ejectment, and defendant filed a complaint in equity in the nature of a cross bill. The parties stipulated that the findings of fact in the suit in equity should become the findings of fact in the action at law. Hill's Ann. Laws, § 381, provides that an action at law is stayed by a filing of such a complaint, pending its decision, and that the decree may provide for further proceedings in the action at law. *Held*, that on a dismissal of defendant's complaint, for want of equity, without any findings, it was error to render judgment in the action at law without making up the issues at law, and proceeding to a trial thereof.
3. **ESTOPPEL BY STIPULATION—TRIAL.**—A stipulation between the parties to an action at law in which a cross bill in equity was interposed, that the suit in equity shall proceed to trial, and that the findings of fact shall be filed in the law action, and judgment entered accordingly, is of no effect where the court, of its own motion, dismissed the cross bill for want of jurisdiction; and the law action must then proceed as if the cross bill had never been filed or the stipulation made.
4. **COSTS.**—Under the peculiar facts in this case, the defendant, who is appellant, should recover costs of the appeal, notwithstanding he failed to establish his claim to the property involved.

From Lake : W. C. HALE, Judge.

In April, 1895, George H. Small commenced an action in the Circuit Court for Lake County against Elmer D. Lutz to recover possession of certain real property. Lutz answered by alleging that he was informed and believed that he had a good defense in equity, but could not obtain full or adequate relief at law, and at the same time filed a cross complaint in which he alleges that he is in possession of the property in controversy, claiming in good faith to own it in fee ; that he claims title under and by virtue of a patent from the United States issued to him on April 15, 1895 ; that on March 28, 1893, he applied to the Register and Receiver of the proper United States Land Office to file upon such lands as a homestead, and was informed by such officers, and also by the Secretary of the Interior, that they were public lands of the United States subject to homestead entry ; that, relying upon these statements, on March 28, 1893, he filed thereon as a homestead, and immediately thereafter entered upon, and has ever since resided upon, cultivated and improved the same ; that on or about July 20, 1894, he commuted his homestead, made final proof, and thereafter received a patent thereto ; that he relied upon the representations of the Register and Receiver and the Secretary of the Interior in making such settlement and purchase ; that he has made valuable and lasting improvements on the premises, of the present value of \$850 ; that Small claims some right, title, or interest therein adverse to him, and has commenced an action of ejectment to recover possession thereof. On the following day a stipulation in writing was entered into between the parties and filed in the action, which recites that "whereas, the defendant herein has filed a bill in equity in the nature of a cross bill, setting up an equitable defense to this action, in which all

the questions at issue in this cause are at issue in said suit, it is therefore stipulated, by and between the parties thereto, that the suit in equity shall proceed to trial, and that the findings of fact in said suit shall be filed in this action, and become the findings of fact in this action, and judgment herein shall be entered upon such findings of fact, so far as such findings of fact are within the issues raised by the pleadings in this action."

Small thereafter filed an answer to the cross bill, in which he admits all the material allegations thereof, except that Lutz's homestead entry was made in good faith, or that in making the same he relied upon the representations of the Register and Receiver, or Secretary of the Interior, that the land was open to settlement, and denies that the improvements thereon were made by him in good faith, or were of the value of \$850, or any other sum whatever; and for a further defense alleges that the land in controversy was granted by the United States to the State of Oregon as swamp and overflowed lands, by an act of congress of March 12, 1860, extending to Minnesota and Oregon the swamp land act of September 28, 1850, entitled "An act to enable the State of Arkansas, and other states, to reclaim the swamp lands within their limits;" that, in pursuance of a provision of section 2 of the latter act, the Hon. H. M. Teller, the then Secretary of the Interior, did in September, 1882, approve and certify the lands in question to the State of Oregon as swamp and overflowed lands, within the meaning of such act, the same being included within what is known as "Approved List No. 5, Lakeview Series," and immediately forwarded such approved list to the Governor of the state; that the defendant is the owner in fee of all such land by *mesne* conveyances from the state, and was in the actual and exclusive possession thereof, and had the same inclosed with a substantial fence and under

cultivation at the time defendant entered thereon to make his settlement and improvement as mentioned in the complaint, and that such entry was made by force and violence, and with knowledge of Small's rights. The answer further alleges that Small is entitled to the immediate possession of the premises in dispute, and that Lutz wrongfully withholds the same from him, to his damage, in the sum of \$500, and concludes with the prayer that the patent to Lutz be canceled as a cloud upon his title, and that he recover the possession of the premises, and \$500 damages, for the unlawful detention thereof.

The reply denies that the land in question was granted to the state by the swamp land act of 1860, or at any other time, or that Small is the owner thereof in fee, or otherwise entitled to the possession of the same, or was in possession or had the same inclosed or under cultivation at the time of Lutz's entry, or that his entry was with notice or knowledge of Small's possession and rights.

After the issues had thus been made up, the cause was, by agreement of the parties, sent to a referee to take and report the testimony; it being stipulated in writing, however, as a part of the facts in the case, that on September 28, 1886, the state conveyed by deed all the title which it acquired to the land in question under the swamp land act to one Allen, whose deed was recorded on January 12, 1888, and that Small has succeeded, by purchase, to the title acquired by Allen, his deed being recorded on April 15, 1895; that on December 27, 1888, William Vilas, the then Secretary of the Interior, duly made an order cancelling the list of swamp lands formerly approved by Secretary Teller, as alleged in the answer to the cross bill. The evidence having been reported by the referee and a trial had upon the pleadings and stipulation of the parties, and the evidence as

so reported, the court found, as conclusions of fact: (1) That Small is the owner in fee of the property in controversy, and that Lutz is not the owner of any interest therein, and is not entitled to the possession; (2) that Lutz entered upon the land on March 28, 1893, while in the actual possession of Small, and with full knowledge of his claim and title thereto, and now wrongfully withholds the possession thereof from Small; (3) that the allegation in the cross bill that the value of the permanent improvements put on the land by Lutz during his occupancy thereof is greater than the value of the use and occupation of the premises during such time was not proven by the testimony. And, as conclusions of law, that Lutz is not entitled to any relief in equity, and that Small is entitled to the possession of all the premises in controversy, and to a decree for his costs and disbursements; and thereupon entered a decree dismissing the cross bill for want of equity. Upon the filing of these findings of fact, and the entry of the decree dismissing the cross bill, the court, without any further proceedings being had in the action at law, and without making or filing any findings of fact or conclusions of law therein, entered a judgment in such action reciting that "this cause having been tried at the October term of this court for the year 1895; and the court, not being then advised as to what judgment should be entered, took the same under advisement to be decided in vacation; and the parties thereto having stipulated that the findings of fact in the suit mentioned in defendant's amended answer, the same being in the nature of a cross bill to this action, should be filed in this action and become the findings of fact in this action, and that judgment should be entered herein upon such findings of fact; and the court having found as the facts in the said suit that the plaintiff herein is the owner in fee of

all the property described in the complaint filed in this action, and entitled to the possession of the same, and that the defendant wrongfully withholds the same from the possession of this plaintiff; and the complaint in the nature of a cross bill mentioned in plaintiff's amended answer herein having been dismissed for want of equity; therefore, it is considered by the court that the plaintiff have and recover of and from the defendant herein, Elmer D. Lutz, the possession of the following described real property (described as in the complaint), and that he have execution for the same, and that the plaintiff recover of and from the defendant herein his costs and disbursements." From the decree entered in the suit in equity, as well as from the judgment entered in the law action, Lutz appeals.

REVERSED.

For appellant there was a brief over the name of *Watson, Beekman & Watson*, with an oral argument by *Mr. Edward B. Watson*.

For respondent there was a brief and an oral argument by *Mr. Chas. A. Cogswell*.

MR. JUSTICE BEAN, after making the foregoing statement of facts, delivered the opinion of the court.

1. It is clear, and is in fact admitted, that the cross bill does not state any facts requiring the interposition of a court of equity. It is, in substance and legal effect, nothing more than an answer to the complaint in the ejectment action. It appears from the pleading that the question sought to be tried is one of legal title only, and there are no circumstances stated showing either the necessity or the right of a court of equity to interfere with the trial thereof in a legal forum. The whole con-

troversty between the parties, as appears from the pleadings and the stipulation, hinges upon (1) the power of Secretary Vilas to revoke and cancel, prior to the issuance of a patent to the state, the swamp land lists approved by his predecessor in office; and (2), if he had such power, the rights of a purchaser from the state of the lands so certified, after such approval and before the order of revocation. These questions are purely legal, founded upon records accessible to both parties, and present no equitable features whatever.

It has been the universal practice of courts of equity, from their organization, to refuse to entertain suits for establishing mere legal titles, for the reason that such a practice would be subversive of the legal and constitutional distinction between the different jurisdictions of law and equity; and, as stated in the early case of *Welby v. Duke of Rutland*, 6 Brown, Parl. Cas. 575, though the admission of a party in the suit is conclusive as to matters of fact, or may deprive him of the benefit of the proceeding which, if insisted on, would exempt him from the jurisdiction of the court, yet no admission of the parties can change the law or give jurisdiction to a court in a case of which it has no jurisdiction. Accordingly, it is held that, when jurisdiction exists in equity over the general subject, the parties may, by mutual assent, litigate their differences in a court of equity, when the assent of the defendant, if withheld, might induce the court to refrain from the exercise of jurisdiction; but where the subject-matter of the litigation is entirely without the pale of equity, and cannot possibly be brought within it, the rule is universal that the assent of the parties cannot confer jurisdiction, but in such cases the court *sua sponte* may take notice of the objection and its want of jurisdiction and dismiss the bill: 1 Beach, Mod. Eq. Jur. § 4; 1 Daniell, Ch. Pl. & Prac, 555; Pittsburgh

Drove-Yard Co.'s Appeal, 123 Pa. St. 250 (16 Atl. 625); *Reynes v. Dumont*, 130 U. S. 354, 395 (9 Sup. Ct. 486); *Sullivan v. Portland R. R. Co.*, 94 U. S. 806; *Derry v. Ross*, 5 Colo. 295. The Supreme Court of the United States in *Hipp v. Babin*, 60 U. S. (19 How.) 271, affirmed a decree of the circuit court dismissing a proceeding which was, in legal effect, an action of ejectment in the form of a bill in equity, although no objection was made by the parties; and in *Lewis v. Cocks*, 90 U. S. (23 Wall.) 466, reversed a decree with directions to dismiss such a bill, although the objection to the jurisdiction was not made by demurrer, plea, or answer, nor suggested by counsel, the court holding that it was nevertheless its duty *sua sponte* to recognize the objection and give it effect, it being the universal practice in equity to dismiss the bill if it be grounded upon a mere legal title. The doctrine of these and similar authorities which might be cited is that the court may, for its own protection and to preserve the distinction existing between the jurisdiction of the courts of law and equity, prevent matters purely cognizable at law from being drawn into equity at the pleasure of the parties interested. So that the trial court clearly committed no error in dismissing the cross bill for want of equity.

2. But it not only dismissed the bill, but immediately proceeded to enter judgment in the law action without any issues having been formed, trial had, or further proceedings taken therein. The effect, under the statute, of the filing of the alleged cross bill was to stay the proceedings at law until it should be disposed of, and, when it was dismissed for want of equity, it simply left the law action to proceed as if it had never been filed. It is true the parties stipulated that the findings of fact in the equity case should become the findings of fact in the law case, and judgment entered thereon, and it was, no

doubt, in pursuance of this stipulation, that the judgment in the law case was rendered ; but it was evidently made on the theory that the cross bill stated facts sufficient to give a court of equity jurisdiction to determine the question in controversy between the parties, and that it would finally result after trial in a decree settling the title. Under that view, the stipulation was, in effect, simply what the law itself would have otherwise determined. The statute provides that the filing of a complaint in equity in the nature of a cross bill in an action at law *ipso facto* stays the proceedings at law, and that the case shall thereafter proceed as a suit in equity, in which further proceedings at law may be perpetually enjoined, or be allowed to proceed in accordance with the decree in the equity case : Hill's Ann. Laws, § 381. So that if the cross bill had been sufficient to give a court of equity jurisdiction, as the stipulation assumes, the decree therein determining the rights of the parties would have been conclusive in a law action without any stipulation of the parties to that effect. But when the cross bill was dismissed for want of equity, no question remained to be tried in that forum, and hence there could be no findings of fact upon issues legitimately before the court which could be binding in a law action. That the court assumed, notwithstanding its decree dismissing the bill for want of equity, to make some findings which embodied the conclusions of the trial judge as to the title of the respective parties, in no way affects this conclusion. The question of title was not properly before it for determination, and any finding or decree rendered therein in reference to the title was clearly erroneous. The only decree actually rendered, and, indeed, the only one proper, was one dismissing the suit or cross bill for want of equity, leaving the question of title to be tried in the forum where it belonged. After the court had

determined that there was no equity in the cross bill, and dismissed it for that reason, the issues should have been made up in the law case, and the action tried out. For this reason the decree in the equity proceeding will be affirmed, and the judgment in the law case reversed, and the latter remanded for further proceedings.

REVERSED.

Decided 7 August, 1899.

ON PETITION FOR REHEARING.

[58 Pac. 79.]

MR. JUSTICE BEAN delivered the opinion.

3. It is claimed that the opinion filed proceeds upon the erroneous theory that the findings of fact made in the equity suit had not been filed in the action. Upon that matter counsel is mistaken, for, although perhaps not clearly appearing in the opinion, it was assumed that the findings had been so filed, and that the judgment was entered thereon. It was held, however, that, because the cross bill had been dismissed for want of jurisdiction, such findings could not legally become the basis of judgment. It is also claimed that we erred in not holding that the stipulation that the pretended suit in equity should proceed to trial, and that the findings of fact should be filed in the law action, and judgment entered accordingly, was an agreement of the parties as to the mode of trial of the action, and that the appellant is estopped from questioning the regularity or validity of such judgment. But we think the stipulation cannot fairly be given that effect. It was entered into by the parties upon the apparent theory that the cross bill stated facts sufficient to give a court of equity jurisdiction to determine the matters in controversy, and that the decree therein would result in

settling the title. On this basis it was agreed that, upon such decree and the findings, judgment should be entered in the law action, but not in case the cross bill should be dismissed for want of jurisdiction. If the equity court had proceeded to try out the issues presented by the pleadings in the suit, and rendered a decree upon the merits, the parties would, no doubt, have been estopped to question its jurisdiction, or right to do so: *Yates v. Russell*, 17 Johns. 461; *Wear v. Ragan*, 30 Miss. 83; *Sawyer v. McAdie*, 70 Mich. 386 (38 N. W. 292); *Townsend v. Moore*, 13 Tex. 36. But it properly refused to be bound by the stipulation, and *sua sponte* took notice of its want of jurisdiction, and dismissed the suit; thus leaving the law action to proceed as if the cross bill had never been filed. The petition for rehearing is denied.

4. The remaining question is one of costs. The proceedings on the equity side of the court, and the law action, had in purpose the accomplishment of but one object, and that was the trial of the title to the land in controversy. The result of the litigation in the court below was a judgment in favor of Small. Having appealed therefrom, and obtaining a reversal of such judgment, he is, in our opinion, entitled to costs in this court, notwithstanding the fact that the decree dismissing his cross bill was affirmed.

REHEARING DENIED.

Argued 22 November, 1898; decided 8 January, 1899.

WHITE v. WHITE.

[55 Pac. 645; 50 Pac. 801.]

1. **DELIVERY OF DEED.**—The paramount idea respecting the delivery of a deed is that the control over the instrument shall at once pass to the grantee, but control over the premises is not an element necessary to the vesting of title: *Fain v. Smith*, 14 Or. 90, *Hoffmire v. Martin*, 29 Or. 240, and *Payne v. Hallgarth*, 33 Or. 430, cited.

2. **IDEM.**—An instruction that if the grantor in his lifetime actually delivered the deed in question to the grantee, with the intention of investing her with the

title, it was sufficient to establish her title, is not susceptible of the construction that if the grantor intended to invest the title at some future time, or at his death, the requirements of a good delivery had been fulfilled, where the context shows that the court had reference to a manual transfer of the deed, and the jury had already been instructed concerning the necessity of a present intention to pass the title.

3. **IDEM.**—An instruction that if the jury do not find that there was an actual manual delivery of the deed they shall inquire into the circumstances of its execution and as to what the grantor did and said, in order to ascertain his intention in the premises, and that if the grantor, after executing and acknowledging it, either by acts or words, or both, expressed his intention to part with it or surrender its custody, there was a good delivery, is not subject to the criticism that a simple handing of the deed by the grantor to the grantee constituted a good delivery.
4. **RECORDING OF DEED—INSTRUCTION.**—An instruction that the validity of a deed, the delivery of which was the question to be determined, is not affected by its being left unrecorded, is not subject to the criticism that it withdraws from the jury the fact of the nonrecording as a circumstance in determining the question of delivery, where the jury were given to understand from the whole charge that the nonrecording was a circumstance which they might consider with other facts in the case upon the question whether there was a delivery.
5. **RETAINING POSSESSION OF GRANTED LAND.**—An instruction that if it were understood between the parties to a deed that the grantor should hold possession during his lifetime it would not prevent the title passing, is not subject to the criticism that it withdraws from the jury the effect of such agreement as bearing upon the question of delivery *vel non*, where it is apparent that its purpose was merely to combat the theory that the passing of dominion over the premises was necessary to a good delivery.
6. **TRIAL—SPECIAL QUESTIONS OF FACT.**—Special questions submitted to a jury under Section 215, Hill's Ann. Laws, should relate to some probative fact upon which the rights of the parties depend, and which would be determinative of the case, and not to mere evidentiary facts which may be only *prima facie* evidence of other facts or of the fact to be proved.
7. **APPEAL—MOTION TO STRIKE PORTION OF BRIEF.**—Before an appeal is determined a motion to expunge a portion of the adverse party's brief will be denied, where it is not claimed that the matter assailed is of such a nature as to require prompt action to protect the dignity of the court, though such a motion may be considered on the question of costs.

From Multnomah : E. D. SHATTUCK, Judge.

Actions of ejectment by Isaac L. White, Ella W. Tichner and Gertrude White against Zipporah White.

This cause, and three others between the same parties, and involving the same state of facts, except that they were concerning separate parcels of real property, were, by stipulation of the parties, consolidated and tried together. The action is in ejectment, and plaintiffs

claim title to the property involved as heirs at law of Levi White, their father; and the defendant, by virtue of a deed from him, signed, sealed, and acknowledged January 17, 1894. The deed is in form sufficient to convey title, if there was a delivery. It bears date January 17, 1893, but this is admitted to have been a mistake, and should have been 1894, instead. The tendency of the testimony produced at the trial is as follows (but, for perspicuity, it is given in a different order from that in which it was introduced): The deed was drawn by White's legal advisers at his instance, and, in February or March, 1894, being then in view of the premises, he told the defendant, who was his wife by a second marriage, that he intended to give them to her. The subject was not mentioned again until June 28, 1894, in the afternoon, when White called her into the smoking room, and said to her, "Zip, this is the deed to your property," at the same time handing it to her. By his direction she inclosed it in a sealed envelope, and, at his dictation, made the following indorsement thereon: "The here inclosed deed for three different pieces of property was placed in my possession by my husband, Levi White, June 28, 1894. Zipporah White." He then told her to take possession of it, and put it in the box in the safety-deposit vault. For the time being she put it in a private bureau drawer, and on July 3, 1894, they went together to the safety-deposit vault, and he opened the box. She then handed him the deed, but "he would not touch it," and directed her to make the deposit in person, and she did as he bid her. White had engaged the box in the deposit vault about the twentieth of June, 1894, and at the same time gave her a key, and told her the box was for her use as well as his own, and deputed her in writing to open it, and to have access to and control of its contents. On June 27, 1894, White made his last

will and testament, but did not devise the property in controversy. It contains a clause reciting, among other things, that he had theretofore, in consideration of natural love and affection, conveyed to his late wife, Henrietta, property of large value, all of which plaintiffs had inherited from her subject to his right of curtesy, by reason whereof he did not feel it incumbent upon him to make other or further provisions for them, or either of them, except as made by the provisions of said will. White died on the eighteenth of January, 1895, and on the twenty-third the box was opened in the presence of the defendant and counsel representing both parties, and others, with a key furnished by the defendant. It was found to contain divers papers,—among others, the deed in question and said will, together with four insurance policies (Levi White being the assured), for amounts aggregating \$5,500, covering buildings situate upon parcels of the disputed premises, a deed to the defendant for property in California, two mortgages to defendant, and other papers. The deed in question was taken from the envelope, and given into the custody of B. Goldsmith, who shortly returned it to defendant, and she had it recorded.

There was evidence tending to show that in March, 1894, White expressed to the plaintiff, I. L. White, with whom he was upon terms of intimacy, his willingness to sell the property concerned for a price then named, and that he had never in any manner suggested or intimated to the said I. L. White that he had conveyed it to the defendant; that prior to the seventeenth of January, and thereafter to the twenty-eighth of June, the premises in dispute, or some portions thereof, were under lease, and that White was in receipt of the rents, collected either by himself or an agent under his direction, and that after said dates no visible change took place in the manage-

ment, control, or enjoyment of the property; that in July, 1894, White made a written lease in his own name to one parcel for a period of five years, and in October of the same year made another to a second parcel for a period of more than one year, and collected the rents thereon, which were carried to his individual account; that in June, 1894, he caused the premises to be listed and assessed to himself as owner, and during the same year he caused repairs to be made upon the property, and paid the costs thereof; that in July he offered to sell a portion of the premises, and put a price upon it, and subsequently did the same touching another portion; that the insurance policies had been taken out prior to January, 1894, and continued to various times in 1895; that no assignment of any interest therein had been made, or notice of any change of ownership given to the insurance companies, at any time; that, at the time one of the leases above referred to was made, White discussed with his wife the propriety of making it, and the matter of the insurance policies had never been brought to her attention; that White had charge of the property with her consent, and looked after the repairs, and told her that the taxes and cost of repairs exceeded the rents. He also had charge of her individual funds, loaned them, and kept a separate account with her. The question of recording the deed had never been discussed, and none of the defendant's papers had been deposited in the box by herself, except the deed in question. It was shown by the safety-deposit record that between June 20 and December 17, 1894, White had opened the box twenty-five times—among other dates, on June 28 and 30—and at no time had it been opened by the defendant alone, but on the third day of July, 1894, it was opened by them jointly. At the proper time the trial court instructed the jury,

fully touching the issues involved, to which no exceptions were taken by either party. Other instructions were then given at the request of plaintiff's counsel, and also at the instance of defendant's counsel, covering much of the subject-matter. To the latter, several exceptions were taken and reserved, and these form the basis for the assignments of error. In connection with the general verdict, the court submitted a question for a special finding, over the objection of appellants, as follows: "Did Levi White in his lifetime voluntarily place the deed now in evidence in this action (being deed executed by himself to Zipporah White, January 17, 1894) in possession and control of said Zipporah White, the grantee named in said deed?" which was answered in the affirmative by the jury; and, the general verdict and judgment being for defendant, plaintiffs appeal.

AFFIRMED.

For appellants there was a brief over the name of *Cox, Cotton, Teal & Minor*, with an oral argument by *Mr. Lewis B. Cox*.

For respondent there was a brief over the names of *Bronaugh, McArthur, Fenton & Bronaugh*, and *Dolph, Mal-lory & Simon*, with an oral argument by *Messrs. William D. Fenton* and *Cyrus A. Dolph*.

MR. CHIEF JUSTICE WOLVERTON, after making the foregoing statement of the facts, delivered the opinion.

The contention of counsel for plaintiffs in the court below was that the deed in question was not delivered within the lifetime of Levi White, the grantor; that it was his design "to hold these lands during his life, and when, in the course of nature, he was forced to relinquish them, that they should then go to the respondent"

(in other words, that he intended the deed should operate as a will, and take effect at his death, and that in the meantime it was ambulatory in its nature, subject to his control or recall, and could have been modified, revoked or destroyed, and, therefore, it never became operative as a conveyance of title, because it was never delivered); while the defendant there contended that the deed was delivered on or about the twenty-eighth day of June, 1894, and that the title to the property thereupon vested in her. Evidence touching the acts and demeanor of the parties to the deed, their disposal of it, and their manner of treating the premises embraced in the descriptive clause prior to, at the time of, and subsequent to, the supposed delivery of June 28, was produced by both parties to the action, and introduced without objection. Among other things, the court instructed, at the instance of the plaintiffs, that "delivery may be made by words without acts, or by acts without words, or by both; but, however and whenever made, it must be accompanied with the present intent on the part of the grantor to part with all dominion and control over the deed and the premises therein described, as their owner, and to vest in the grantee, as owner, full dominion and control over said deed and premises." The same idea touching the necessity of an intent to part with dominion over the premises, as owner, was reiterated in the next succeeding instruction. But in the ninth the following language is employed: "Notwithstanding what Levi White may have done towards placing said deed in the possession of the defendant, or anything he may have said in regard thereto, if you find, from all the facts and circumstances of the case, touching his action towards the deed and the premises therein described, that it was his intention to hold dominion and control over said deed and premises during his life, and not to

absolutely divest himself of dominion and control over said deed, and dominion over and title to the premises therein described, that said deed was to take effect only at his death, and that by said deed and his will executed on June 27, 1894, he intended to make one testamentary disposition of all his property and estate, then and in that event the deed is null and void, and your verdict must be for the plaintiffs." Thus was the idea just alluded to here again emphasized. The first two instructions qualify dominion by the use of the words "as owner," while no such qualifying words appear in the one last above quoted.

1. Let us inquire now whether these instructions give a correct exposition of the law as applied to the delivery of a deed—not that error may be predicated thereon, for they were given at plaintiffs' request, but it will serve to test the correctness of those of the defendant's instructions to which objections were made. It is deemed pertinent to the inquiry, also, that the defendant's instructions were submitted to the jury after those of the plaintiffs; and we must assume that they were drawn to meet the exigencies of the case as it then appeared to counsel, in view of their contention. The parties agree that a delivery of the deed was essential to pass the title, and all the authorities are substantially of one accord touching the requisites of a good delivery. We will recall some of them: "No formality, either of words or action, is prescribed by the law as essential to delivery. Nor is it material how or when the deed came into the hands of the grantee. Delivery, in the legal sense, consists in the transfer of the possession and dominion; and whenever the grantor assents to the possession of the deed by the grantee, as an instrument of title, then, and not until then, the delivery is complete. The possession of the instrument by the grantee may be simultaneous with this

act of the grantor's mind, or it may have been long before ; but it is this assent of the grantor which changes the character of that prior possession, and imparts validity to the deed :” 1 Greenl. Ev. (14 ed.), § 568a, note 1. “Whether there has been a delivery of the deed is a question of fact, rather than of law, depending upon the intent of the grantor to vest an estate in the grantee. If a deed be so disposed of as to evince clearly the intention of the grantor that it shall take effect as a conveyance, it is a sufficient delivery :” 2 Jones, Real Prop., § 1220. “The delivery of a deed is essential to the transfer of the title. It is the final act, without which all other formalities are ineffectual. To constitute such delivery, the grantor must part with the possession of the deed, or the right to retain it :” *Younge v. Guilbeau*, 70 U. S. (3 Wall.) 636, 641. “Leaving out all questions of acceptance by the grantee, we think that, so far as the grantor is concerned, any acts or words, either or both, whereby he in his lifetime parts with all right of possession and dominion over the instrument, with the intent that it shall take effect as his deed, and pass to the grantee, constitute a delivery of a deed of conveyance, and that nothing less will suffice :” VIRGIN, J., in *Brown v. Brown*, 66 Me. 316, 321.

“To make the delivery good and effectual, the power of dominion over the deed must be parted with. Until then the instrument passes nothing ; it is merely ambulatory, and gives no title :” *Cook v. Brown*, 34 N. H. 460, 475. “Nor is any particular form of ceremony necessary to constitute a sufficient delivery. It may be by acts or words, or both, or by one without the other ; but what is said or done must clearly manifest the intention of the grantor and of the grantee that the deed shall at once become operative to pass the title to the land conveyed, and that the grantor loses all control

over it :'' *Byars v. Spencer*, 101 Ill. 429, 433 (40 Am. Rep. 212). "In all cases of this class, whatever physical disposition of the instrument may have been made, the fundamental inquiry is whether the minds of the parties were agreed in regarding the deed as presently the deed of the grantee, and without any condition or reserve :'' *McCullough v. Day*, 45 Mich. 554, 558 (8 N. W. 536). "This is settled : that delivery is not complete until the person delivering (grantor) has so dealt with the instrument delivered as to lose all control over it. And whether he has so dealt with the instrument depends upon the intent to be deduced from all the surrounding circumstances—the *res gestæ*." THORNTON, J., in *Hibberd v. Smith*, 67 Cal. 547, 552 (56 Am. Rep. 726, 4 Pac. 475). "To constitute a delivery, the grantor must part with the legal possession of the deed, and all right to retain it. The present and future dominion over the deed must pass from the grantor. And all this must happen in the grantor's lifetime :'' *Porter v. Woodhouse*, 59 Conn. 568, 574 (21 Am. St. Rep. 131, 13 L. R. A. 64, 22 Atl. 300). Mr. Freeman, in an able, elaborate, and thoroughly complete monographic note to *Brown v. Westerfield*, 53 Am. St. Rep. 537 (66 N. W. 439), says : "The delivery of a deed, in the law of conveyancing, is a transfer of it from the grantor to the grantee, or to some third person for the grantee's use, in such a manner as to deprive the grantor of the right to recall it at his option, and with the intent to convey title."

Our own expressions are in line upon the subject : "The result of the authorities is that, after a writing has been signed, and sealed, and acknowledged, any acts, or words, or circumstances decisive of the intention of the grantor to consummate and to part with it are sufficient to constitute a delivery, and give it validity as a deed :'' Mr. Chief Justice LORD, in *Fain v. Smith*, 14 Or. 82, 90

(58 Am. Rep. 281, 12 Pac. 370). "But if the grantor parts with all dominion and control over the deed, reserving no right to control it or alter its provisions, it is a good delivery:" Mr. Chief Justice BEAN, in *Hoffmire v. Martin*, 29 Or. 240 (45 Pac. 754). And in a late case it is said: "A delivery is effected either by a manual transfer of the deed from the grantor to the grantee, or to some third party for his use, or by doing some act, or saying something, or by both, whereby the grantor manifests an unequivocal intention to surrender the instrument so as to deprive himself of all authority over it or the right to recall it, and to consummate the conveyance:" *Payne v. Hallgarth*, 33 Or. 430 (54 Pac. 164).

The authorities are very numerous to the same effect, but those cited are sufficient for our purpose, which is to show that the paramount idea attending the requisites of a delivery is that the dominion and control of the instrument shall pass to the grantee, with intent on the part of the grantor that it shall become presently operative, and that the dominion and control over the premises do not enter into the transaction as an element necessary to the vesting of title in the grantee. In none of the definitions to which we have made reference, nor in any other that we have been able to find, is there the faintest allusion that a present transfer of dominion over the premises is at all necessary to the delivery.

Many of the authorities use the expression "with intent that the title shall pass," but none, as said by the court below, "with intent to part with dominion over the premises described as owner," or otherwise. It will be noted from the citations that it is unusual and out of line to refer in any manner to the disposal of the dominion over the premises, in defining "delivery." If, however, it was meant thereby to convey the same idea as "with intent to pass the title," or "to consummate the

conveyance," or other equivalent expression as voiced by the authorities, and if so understood, there could probably be no objection to its use in that connection. But the ninth instruction, given at plaintiff's request, so extended its meaning as to embrace an intent to part with the dominion over the premises unqualified by the words "as owner," and to vest such dominion in the grantee; thus making the delivery depend upon the intent to part with dominion over the premises,—an element entirely foreign to any which go to constitute a good delivery of a deed. Construing all the instructions given on plaintiffs' suggestion together upon the subject, they must be taken as promulgating the idea that there must be an intent on the part of the grantor to transfer dominion over the premises as well as the deed, and, therefore, did not correctly state the law of the case.

Under plaintiffs' theory, if the law was as counsel put it in these instructions, it would afford a greater incentive to the jury, under the evidence, to conclude that by reason of the fact, as disclosed, that no apparent change had taken place regarding the possession and dominion over the premises, no delivery of the deed had taken place, than if the law had been correctly expounded. The defendant was proceeding upon the theory that a delivery of the deed had taken place prior to the death of White, and evidence was admitted touching the circumstances attending the disposal of the deed, after being signed, sealed, and acknowledged, and also of the manner in which the respective parties treated the premises embraced by the description from a time prior to the signing of the instrument up to the decease of White; and in this there could have been no impropriety. The use of the premises by the parties to the transaction would serve to explain the purposes to be subserved by their disposal of the deed. If possession

was at once taken by the grantee, the circumstance would serve to support the idea of a delivery (2 Jones, Real Prop. § 1227), while the converse would be true if the possession continued with the grantor, without any apparent change from that which obtained prior to the alleged grant. And more especially would this be the case where the grantor continued to lease the premises and insure the buildings situate thereon in his own name. The jury were entitled to all these facts, as they served to throw light upon the pivotal question, whether White intended to vest the title in his wife prior to or at the time of his death, and as to the purposes for which they might consider the same they were fully and properly instructed. This is conceded.

We come now to the instructions requested by the defendant and given by the court. She was resisting plaintiff's theory, and opposing it with her own, and combating as well the erroneous instruction alluded to, and it is in the light of these relative theories and contentions of the respective counsel we must consider the subsequent instructions. We must step into the jury box, as it were, and listen to the instructions as if they were addressed to us as jurors, and for our direction and guidance in the ascertainment of results under the evidence adduced. Thus situated, we must interpret them, if obscure, and determine how the jury must have been impressed with them. If such impressions were in accord with the law of the case, as applicable to the issues, there is no just cause for a reversal. Of course, if the instructions are palpably bad, as matter of law, the error is vital.

2. The defendant's third instruction, complained of, is as follows: "If you find from the evidence that Levi White in his lifetime actually delivered the deed in question to the grantee, Zipporah White, with the intention

of investing her with title to the lands described in it, that is sufficient to establish her title." Plaintiff's claim that this charge is susceptible of the construction that if the grantor intended to vest the title, not then, but at some future time, or at his death, as counsel contended at the trial was White's real purpose, then the requirements of a good delivery sufficient to carry the title to the grantee had been fulfilled. We do not think that such is the case. The instruction, while not technically correct in its meaning, is not materially obscured. It was evidently meant thereby that if there was a manual transfer of the deed by the grantor to the grantee, with the intention of vesting title to the lands described, it was sufficient to carry title. The intention to invest the title presently can very well be implied from the context; but the jury had already been twice instructed concerning the present intent in that regard, and they could not have been misled by it. There is a fault in the instruction, by the attempt to define "delivery" by the use of the same term, or its derivative, which serves to explain the fourth instruction, to which a much stronger objection is urged.

3. This instruction, to which objection is especially made, is as follows: "If you shall not find that an actual, manual delivery of the deed was made by Levi White—that is, that it was not handed or given directly to Zipporah White, the grantee—then it will be your duty to inquire into the circumstances of the execution of the deed, and as to what Levi White, the grantor, did and said, to ascertain his intention in the premises. The main thing which the law looks at is whether the grantor indicates his will that the deed should pass into the possession of the grantee. And if you find from the evidence that Levi White, after executing and acknowledging the deed in question, either by his acts or words, or both,

expressed his intention to consummate and part with it, or surrender its custody, then I charge you it became a valid grant, and your verdict must be for the defendant." In this fourth charge the court tells the jury, in effect, that if they should not find there had been a delivery of the deed, made by an actual passing from the hand of the grantor to that of the grantee, consummated as contemplated by the third charge, then it was their duty to inquire into the circumstances of the execution of the deed, and as to what White said and did, to ascertain his intention in the premises. This was but another way of getting at the same thing as expressed by plaintiff's counsel—that a "delivery may be made by words without acts, or by acts without words, or by both," but, withal, the intent that the deed should at once become operative must appear. Now, suppose the deed did not pass from hand to hand; if the grantor indicated his will that dominion and control over it should pass to the grantee, and his purpose was to consummate the transaction—that is, vest title in the grantee—and the jury so found from all the evidence, that would be a sufficient delivery, whether the deed actually passed into her hands or not. It must be conceded that the instruction is far from being clear, but the purpose of the person drafting it is reasonably manifest, and we must presume that the jury rightly understood it, so that we cannot say it amounts to a misdirection. There was some controversy as to whether there was a hand to hand transfer of the deed. The defendant testified directly to such a transaction, but plaintiffs challenged the truth of her statement, and the purpose for which it was made, if made as she testified—whether to take effect presently or at his death—and this made it proper for the court to instruct touching both phases of a delivery. There was no intention to charge the jury that a simple handing of the deed

by the grantor to the grantee constituted a good delivery, and, manifestly, they did not so understand it. The language which obtains in the latter part of the instruction is almost, and is in effect, the same as used by Mr. Chief Justice LORD in defining "delivery" in *Fain v. Smith*, 14 Or. 90 (58 Am. Rep. 281, 12 Pac. 365). We think there was no appreciable error in this instruction.

4. The next three instructions against which exceptions were taken are the sixth, seventh, and eighth. The sixth charge is as follows: "The fact, if it be a fact, that the deed in question was not recorded until after the death of Levi White, in no wise affects its validity. A deed is as effectual to pass the title between the parties without being recorded as if recorded." It is objected that this instruction virtually withdrew from the jury the fact of the nonrecording of this deed until after White's death, as a circumstance for their consideration in determining the question of delivery; in other words, that it invaded the province of the jury, and told them that it should have no effect with them, when they had formerly been told to consider it, with all the other facts and circumstances in the case, in arriving at their conclusion. We do not understand that such is the effect of the instruction. It should be read in connection with the general instruction as given by the court of its own motion, and as given at the request of the defendant. If so considered, there is no confusion. The jury were given to understand from the whole charge that, while the recording was a circumstance which they should consider, with the other facts in the case, in determining whether a delivery had been accomplished, yet that a deed, properly executed and delivered, was competent to pass the title without the act of recording.

5. By the seventh, the court charged the jury "that the question of possession of the lands conveyed does

not affect title to the lands. If it were understood between the parties that Levi White should hold possession of the lands conveyed during his lifetime, such understanding would not prevent title passing to Zipporah White. The criticism upon this instruction is like the objection to the sixth—that it necessarily withdraws from the jury the consideration of certain evidence of the highest importance, which had been submitted under the general charge for their consideration. The latter part of the instruction shows that it was to apply, if it was understood between the parties that White should hold possession during his lifetime, and this matter of the understanding in that regard was left to the jury. Defendant was combating plaintiffs' theory, as voiced by their instruction that the passing of dominion over the premises was necessary to a good delivery of the deed; and it was the apparent purpose of this instruction to have the jury distinguish between the deed and the premises, and the effect to be given to a transfer touching the dominion of either. Of like purport and effect is the eighth instruction.

Under the instructions the plaintiffs had ample benefit of the law, and the jury were at full liberty to adopt their theory of the case, had the evidence adduced at the trial so warranted. That the jury understood the purport of the defendant's instructions as we have here interpreted them, there can scarcely be any doubt.

6. This leaves but one question, touching the submission to the jury of the special interrogatory to be returned along with their general verdict. The statute provides that the court may in all cases instruct the jury, if they render a general verdict, to find upon particular questions of fact, to be stated in writing: Section 215, Hill's Ann. Laws. In several cases in this state, where the trial court had refused to submit to the jury partic-

ular questions at the request of one of the parties to the action, it has been held that it was a matter wholly within its discretion, and, therefore, that this court would not review its action in that respect: *Swift v. Mulkey*, 14 Or. 59 (12 Pac. 76), *Wild v. Oregon Short Line Ry. Co.*, 21 Or. 159 (27 Pac. 954), *Knahtla v. Oregon Short Line Ry. Co.*, 21 Or. 136 (27 Pac. 91). But the question here raised, where the particular question had been submitted under objection, is a new one in this court. The ground of the objection is that the question was inconclusive, immaterial, and misleading, and it is insisted that by reason thereof it was error to submit it. The particular questions of fact which the court is empowered to submit along with the general verdict, by statutory intendment, should be such as are material and pertinent to the issues involved in the case; otherwise the law could serve no good purpose: *Maxwell v. Boyne*, 36 Ind. 120; *Fowler v. Hoffman*, 31 Mich. 215; *Crane v. Reeder*, 25 Mich. 303. The particular interrogatories to which the statute relates were probably intended to enable the court and counsel to determine the grounds upon which the jury has based the general verdict; but to permit it to be interrogated touching matters which could have nothing to do with the controversy could not subserve such a purpose, and the tendency of such a practice would be to confuse and mislead the jury, as it pertains to the general result. So it would seem, as a general rule, that the questions should relate to some probative fact upon which the rights of the parties depend, and which would be determinative of the case, and not to mere evidentiary facts, which may be only *prima facie* evidence of other facts, or of the fact to be proved. It is rather the ultimate probative fact from which a conclusion of law is deducible, or one from which the existence of such ultimate fact necessarily

follows, than an intermediate probative fact, not determinative in its nature, upon which another or even the ultimate fact may depend, to which the statute pertains: *Chicago & N. W. Ry. Co. v. Dunleavy*, 129 Ill. 132, 143 (22 N. E. 15); *Chicago City Ry. Co. v. Taylor*, 170 Ill. 49 (48 N. E. 831); *Hatfield v. Lockwood*, 18 Iowa, 296; *Thomas v. Schee*, 80 Iowa, 237 (45 N. W. 539). And yet, says ADAMS, C. J., in *Hawley v. C. B. & Q. Ry. Co.*, 71 Iowa, 721 (29 N. W. 790), "We do not say that a party may not be entitled to have a special interrogatory submitted, even where it is such that an answer most favorable to the party would not entitle such party to a verdict." The nature and form of the particular question are largely within the discretion of the trial judge, and unless it is apparent that there was a clear abuse of such discretion, or unless the question submitted even upon immaterial or inconclusive matters was palpably misleading as to the main issue, or could not be answered without danger of confusion or misrepresentation (*Phoenix v. Lam*, 29 Iowa, 352), it would not afford ground for reversal. Now, the question propounded was not of a decisive fact from which a conclusion of law is directly deducible, but it was not altogether irrelevant to the issues involved, and we cannot say that it was an abuse of the court's discretion to submit it. And, furthermore, it does not appear to be of such a nature as that the jury was probably misled by it, and surely it might have been answered without confusion or misrepresentation; so we conclude that the submission of the question was not cause for reversal.

AFFIRMED.

Decided 8 November, 1897.

ON MOTION TO STRIKE OUT PARTS OF RESPONDENT'S
BRIEF.

[50 Pac. 801.]

MR. CHIEF JUSTICE MOORE delivered the opinion.

7. This is a motion to expunge from respondent's brief all that portion of the will of Levi White, deceased, not incorporated in the bill of exceptions. The record shows that plaintiffs, as heirs at law of the deceased, commenced actions against the defendant and her tenants to try the title to, and recover the possession of, certain real property of which defendant claimed to be seized in fee by the deed of Levi White. The defendant having been substituted for her tenants, the actions were consolidated, at the trial of which the jury found a special verdict to the effect that Levi White voluntarily delivered said deed to defendant, for whom they also returned a general verdict, and, judgment having been rendered thereon, plaintiffs appeal. The bill of exceptions shows that in the will left by the deceased he made no devise of any of the real property in question, but provided therein for the plaintiffs by name, and in the ninth paragraph thereof the testator explains his reason for not making further allowances to them. This paragraph only is set out in the bill of exceptions, but counsel for respondents have published in their brief what purports to be a copy of the will, all of which appellants move to strike out, except said paragraph nine. If this was a proceeding for the retaxation of costs on appeal, by reason of the publication of immaterial matter in respondent's brief, the

necessity for a motion to strike out would be apparent, in which case if it should seem that such matter had been intentionally inserted with a view to augment the expense of the trial, the motion to eliminate should, in justice, be allowed ; but before the cause has been tried, we fail to see wherein the appellants have been or can be injured by the publication of which they complain. In the preparation of briefs, counsel for the parties litigant must be allowed to exercise a liberal discretion in determining what matter should be inserted or excluded therefrom, or if this court is to assume and exercise the functions of a censor, and thereby prohibit the publication of briefs, except such as meet its approval, the practice might result in the impairment of their usefulness. The object of a brief is to lessen the labors of the judges of appellate tribunals, and it will be admitted that the labor demanded of them in the consideration of causes is always in an inverse ratio to the amount of care and thought expended by counsel in the preparation of their briefs. Such being the case, it would be highly improper to strike from a brief anything that might tend to aid the court in the performance of its duties. In the case at bar it is not claimed that the matter assailed in the brief is sham, frivolous, or impertinent, thereby necessitating prompt action to protect the dignity of the court, and hence it follows that the motion must be overruled, and it is so ordered.

MOTION OVERRULED.

Argued 28 November, 1898; decided 3 January, 1899.

FIRST NATIONAL BANK v. HOVEY.

[55 Pac. 585.]

PLEADING—RIGHT OF ACTION—MONEY HAD AND RECEIVED.—Where the maker of a note delivered money to a bank to be forwarded to the payee and applied on his note, and the bank delivered it to another bank, with instructions to pay it to the payee generally, the latter bank was not, on failing to pay over the money, liable to an indorsee of the note as for money had and received; there being no obligation on its part to pay it to the indorsee, or to see that it was applied on the note.

From Lane: J. C. FULLERTON, Judge.

Action by the First National Bank of Eugene against A. G. Hovey and others. From a judgment for defendant, sustaining a demurrer to the complaint, plaintiff appeals.

AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. Geo. B. Dorris*.

For respondent there was a brief and an oral argument by *Mr. A. C. Woodcock*.

MR. CHIEF JUSTICE WOLVERTON delivered the opinion.

This is an action for money had and received, the complaint averring in substance, omitting such allegations as are formal merely, that on December 9, 1892, the plaintiff loaned J. M. Kitson \$2,000, and as evidence thereof took his promissory note, payable on demand, which remains unpaid; that, to secure the payment thereof, Kitson indorsed to plaintiff a certain promissory note, made, executed, and delivered to him June 15, 1892, by James McCoy, James H. McCoy, and S. J.

McCoy, calling for the sum of \$3,000, payable, with interest, on or before December 31, after date, and that plaintiff was, on January 6, 1893, and now is, the holder of said note, and entitled to receive payment thereof; that on January 6, 1893, the said James H. McCoy delivered to the First National Bank at Oaksdale, Washington, the sum of \$2,000, to be transmitted to Kitson at Eugene City, to apply on said note, which sum was telegraphed to the said Lane County Bank (the defendants) on the same day, with instructions to pay it to Kitson; that the defendants received said sum of \$2,000, but have not paid the same, or any part thereof, to Kitson, but converted it to their own use; that Kitson was authorized and directed by McCoy to credit said sum on the said \$3,000 note then in the hands of plaintiff as indorsee, which sum it is entitled to receive from defendants; that defendants are indebted to the plaintiff in the said sum of \$2,000 for money had and received to the use and benefit of plaintiff, and that before the commencement of the action plaintiff demanded the same from defendants. To this complaint a general demurrer was filed, which was sustained, and, judgment being entered dismissing the action, and for costs and disbursements, the plaintiff appeals.

The sufficiency of the complaint in stating a cause of action is challenged by the demurrer. It is contended that James H. McCoy caused the money involved to be transmitted to the defendant's bank for Kitson, to be applied upon the said McCoy note indorsed to plaintiff, and that it thereby became the plaintiff's duty to see that it was so applied. The principle involved by the controversy is that whenever one party has in his hands money which belongs to another, and which he is not entitled to and cannot in good conscience retain as against that other, the law, notwithstanding a want of privity between

the parties, will imply a promise upon his part to pay it over, and require him to disburse the fund according to the tenor of such implied obligation. Mr. Chief Justice BEAN, in *Washburn v. Investment Co.*, 26 Or. 436 (38 Pac. 621), said: "Where one person receives a fund or property from another, and instead of paying him therefor, is allowed to retain the consideration under an agreement to pay it to the creditor of the other party, * * * it would be just and proper that such third party should have the right to maintain an action on the contract in his own name." The rule is an exception to the general one requiring the existence of privity, without which the contract cannot be enforced: Mr. Justice STRONG, in *National Bank v. Grand Lodge*, 98 U. S. 123, says: "No doubt the general rule is that such a privity must exist. But there are confessedly many exceptions to it. One of them, and by far the most frequent one, is the case where, under a contract between two persons, assets have come to the promisor's hands or under his control which in equity belong to a third person. In such case it is held that the third person may sue in his own name. But then the suit is founded rather on the implied undertaking the law raises from the possession of the assets than on the express promise."

A case much to the purpose is that of *Hall v. Mars-ton*, 17 Mass. 574, wherein, upon the statement contained in the headnote, as follows: "A, being the debtor of B in the sum of \$1,300, and also of C in the sum of \$400, and being abroad, remitted to B a bill of exchange for \$1,000, with directions, when the amount should be received, to pay to C \$200," it was held that C thus acquired a right of action against B for the money which A had directed should be paid to him. But that doctrine is so well established it is quite unnecessary to extend the discussion: *Arnold v. Lyman*, 17 Mass. 400

(9 Am. Dec. 154); *Mellen v. Whipple*, 1 Gray, 317, 322; *Carnegie v. Morrison*, 2 Metc. (Mass.), 381, 401; *Bank of the Metropolis v. First National Bank*, 19 Fed. 301; *Perry v. Swasey*, 12 Cush. 36; *Bohanan v. Pope*, 42 Me. 93; *Wyman v. Smith*, 2 Sandf. 331; *Donkersley v. Levy*, 38 Mich. 54; *Warren v. Batchelder*, 16 N. H. 580; *Roberts v. Ely*, 113 N. Y. 128 (20 N. E. 606). The action for money had and received is appropriate and commensurate to the purpose: *Hoxter v. Poppleton*, 9 Or. 481; *Chapman v. Forbes*, 123 N. Y. 532 (26 N. E. 3). See, also, *Roberts v. Ely*, 113 N. Y. 128 (20 N. E. 606), and *Hall v. Marston*, 17 Mass. 574, and other cases cited.

The statement of the complaint is that McCoy delivered to the Oaksdale Bank the sum of \$2,000 to be transmitted to Kitson to apply on the McCoy note, and that the Oaksdale Bank telegraphed it to the Lane County Bank, with instructions to pay the same to Kitson. Now, under the averments, the Lane County Bank would have discharged its obligations to McCoy or the Oaksdale Bank whenever it paid the money to Kitson, and thereupon it would have become the duty of Kitson to apply it upon the note held by plaintiff. The Lane County Bank was not charged with any duty to pay the money to the plaintiff, or to see that it was applied upon McCoy's note. And in this aspect it cannot be said that the Lane County Bank has in its hands funds belonging to the plaintiff which in equity and good conscience it cannot withhold, and hence the complaint is insufficient to support the action. If the Lane County Bank's instructions bound it to the duty of seeing that the money was applied upon the McCoy note, then we presume the law would imply a promise upon the part of the Lane County Bank to pay it to plaintiff, and the action would lie. But if the money was in the meantime recalled or otherwise disposed of by direction of McCoy, and prior to the

commencement of the action, the obligation would not remain to pay it to the plaintiff. In this view, the complaint is otherwise defective in not stating that the defendants still held and retained such money to the use and benefit of plaintiff. Hence there was no error in sustaining the demurrer, but the cause will be remanded for such other and further proceedings as may seem pertinent, not inconsistent with this opinion.

AFFIRMED AND REMANDED.

Decided 19 December, 1898.

PORTLAND TRUST CO. v. NUNN.

[55 Pac. 441.]

LIABILITY OF GRANTEE OF MORTGAGED PROPERTY.—The grantee of mortgaged premises under a deed reciting that he assumes and agrees to pay the mortgage debt is not personally liable to the mortgagee, if his immediate grantor was not personally bound: *Young Men's Association v. Croft*, 34 Or. 106, followed.

From Multnomah: LOYAL B. STEARNS, Judge.

Suit to foreclose a mortgage. Plaintiff appeals.

AFFIRMED.

Messrs. Bernstein & Cohen for appellant.

Mr. Lawrence A. McNary for respondent.

MR. JUSTICE MOORE delivered the opinion.

This is a suit to foreclose a real estate mortgage, and to recover any deficiency that may remain after the sale of the mortgaged premises from a grantee thereof, who had assumed and agreed to pay the mortgage debt, notwithstanding his immediate grantors were not personally

liable therefor. It is alleged in the complaint that E. A. and Adith L. Stearns, on November 9, 1890, executed to plaintiff, as trustee for the American Fire Insurance Company, of Philadelphia, a mortgage upon lots 7 and 8, in block 82, in Carter's Addition to the City of Portland, Oregon, to secure the payment of a promissory note for \$2,000, due in three years, with interest at eight per cent. per annum, payable quarterly; that E. A. and Adith L. Stearns thereafter conveyed said premises to G. M. Stearns, subject to the mortgage; that G. M. Stearns and his wife, on April 16, 1891, conveyed said land to Richard Nunn, who, as a part of the consideration therefor, accepted a deed which recited that he assumed and agreed to pay the said mortgage debt; that on March 20, 1893, Nunn conveyed the said lots to Hattie De Burgh, who also covenanted to pay the said debt; that Mrs. De Burgh and her husband, on August 22, 1894, conveyed the premises to the Telfer & Stearns Real Estate Company, a corporation. The complaint is otherwise in the usual form, and prays for a personal judgment against E. A. and Adith L. Stearns, Richard Nunn, and Hattie De Burgh. The defendant Nunn, appearing for himself only, demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of suit against him, and, the demurrer having been sustained, plaintiff declined to amend its complaint, whereupon the suit was dismissed as to Nunn, and plaintiff appeals.

The question presented by this appeal was considered in the case of *Young Men's Association v. Croft*, 34 Or. 106 (55 Pac. 439), and decided adversely to plaintiff's contention, and for the reasons announced in that case, the decree is affirmed.

AFFIRMED.

Decided 8 January; rehearing denied 13 March, 1899.

WARREN v. DE FORCE.

[55 Pac. 532.]

1. **PUBLIC LANDS—RIGHT TO PURCHASE TIDE LAND.**—A purchaser of public lands under Laws, 1878, p. 41, § 5, providing, *inter alia*, that an application to purchase shall be accompanied by an affidavit that the purchaser has not directly or indirectly made any previous purchase of lands from the state, which, together with the lands described in his application, exceed a stated amount, depending on the class of land, is not entitled to purchase the maximum acreage of either class without regard to his previous purchase of lands belonging to the other class; in other words, a purchaser's right is exhausted by purchasing the maximum acreage of any one class.
2. **EQUITY JURISDICTION.**—Plaintiff bought public tide lands of school commissioners by falsely swearing that he had not previously purchased three hundred and twenty acres of state lands. The commissioners executed no deed to him, and thereafter sold and conveyed the lands to defendant, who knew of plaintiff's purchase. *Held*, that plaintiff was not equitably entitled to any relief, as the statute, Laws, 1878, p. 41, § 5, authorizes the commissioners to sell only three hundred and twenty acres of state lands to a single settler.

From Clatsop: THOS. A. McBRIDE, Judge.

Suit by P. C. Warren and another against J. H. De Force and others to have defendant, Sarah De Force, decreed to hold the legal title to certain land in trust for plaintiffs. Decree for defendants, and plaintiffs appeal.

AFFIRMED.

For appellant there was a brief over the name of *Fulton Bros.*, with an oral argument by *Mr. Chas. W. Fulton*.

For respondent there was a brief over the name of *John H. & A. M. Smith*, and *Wm. M. La Force*, with an oral argument by *Mr. John H. Smith*.

MR. JUSTICE BEAN delivered the opinion.

This is a contest between different purchasers of the same land from the state. The facts are that on Febru-

ary 28, 1893, the plaintiff D. K. Warren applied to the Board of School Land Commissioners to purchase twenty-seven and eighty-eight one-hundredths acres of tide lands in Clatsop County, fronting and abutting on the donation claims of Eberman and Coffinbury, and lot 1, of section 15, township 8 N., of range 10 W., and paid the state the appraised value thereof. His application, being in the form required by statute, was approved, and a deed made to him, but, by mistake of the clerk of the board, the tide land in front of lot 1 was omitted therefrom. Thereafter, and in February, 1893, the defendant Sarah De Force, with knowledge of plaintiff's prior application, applied for and purchased from the board of commissioners the tide land in front of lot 1, and received a deed therefor, and the object of this suit is to have her decreed to hold the legal title of such land in trust for Warren and his co-plaintiff, who has succeeded to an undivided half of his interest therein. As a part of and accompanying his application, Warren filed an affidavit made by himself, of the kind and substance required of persons applying to purchase state lands by the statute in force at that time, in which he states, among other things, that he had not made any previous purchase of lands from the state, which, together with the lands described in the application, would exceed three hundred and twenty acres, although, as it is now admitted, he had in fact prior to that time purchased from the state more than four hundred acres of land in his own name and right. Upon these facts, the court below held that plaintiffs were not entitled to any relief in this suit, because Warren had exhausted his right to purchase lands of the state prior to his application for the lands in controversy; and this is practically the only question in the case.

1. Warren's application was made under the pro-

visions of the act of October 18, 1878 (Laws 1878, p. 41). By section 3 of this act it is provided that the Board of Commissioners for the Sale of School and University Lands "are hereby authorized and required to sell school and university, capitol building lands, land granted to the state by the United States adjoining salt springs, lands granted the state for the purpose of internal improvement, and agricultural college lands which have been, or may hereafter be, selected, to actual settlers, in such quantities as they may deem advantageous to the state, not exceeding a half section to any one settler, and not exceeding one hundred and sixty acres to any one person not a settler." Section 4 provides that "Such board of commissioners are further authorized to sell swamp and overflowed lands, which may have been or may hereafter be selected, as fast as such selections are segregated and approved, as required by the laws of the United States granting such lands to the state; and tide and overflowed lands on the sea coast, owned by the state, in such quantities as they shall deem most advantageous to the state, not exceeding three hundred and twenty acres to any one person." And section 5 provides that all applications to purchase any of the lands of this state "shall be accompanied by the affidavit of the applicant, taken before some notary public or county clerk, to the effect that he is eighteen years of age, is a citizen of the United States, or has declared his intention to become such; that he is a citizen of this state; that he has not directly or indirectly made any previous purchase of lands from the state, or any one for him, which, together with the lands described in the application, exceed—in case such application is for the purchase of any of the lands specified in the third section of this act by a settler—three hundred and twenty acres, or, in case of a non-settler, one hundred and sixty acres, or, if the

application is for the purchase of any lands specified in the fourth section of this act, three hundred and twenty acres."

The contention for the plaintiffs is that by sections 3 and 4 the state lands are divided into two classes, and that a qualified purchaser is entitled to purchase the maximum acreage of either class without regard to his previous purchase of lands belonging to the other, and hence the fact that Warren had purchased more than three hundred and twenty acres of other land did not disqualify him from purchasing the maximum acreage of tide lands as provided in section 4 of the act. But it seems to us the vice of this argument lies in the fact that neither section 3 nor 4 undertakes to define the qualification of a purchaser of state lands. They provide the maximum acreage which may be sold by the board to any one person of the several classes of land, but do not declare to whom it may be sold. They define the rights and powers of the board, but the qualification of a purchaser is found in section 5, which provides, in effect, that he must be over the age of eighteen years, a citizen of the United States or one who has declared his intention to become such, a citizen of this state, and one who has not directly or indirectly made any previous purchase of lands from the state which, together with the lands described in his application, exceed, in case of an application for the purchase of the lands specified in section 3, one hundred and sixty acres if a non-settler, and three hundred and twenty acres if a settler; and, if the application be for the purchase of swamp or tide lands, three hundred and twenty acres. The language of section 5 is clear and unambiguous. It plainly makes any previous purchase of state lands which, together with those described in his application, exceed the maximum acreage, as much of a disqualification as a want of

the requisite age, residence, or citizenship. It seems to have been the intention of the legislature to limit the quantity of land which any one person might purchase from the state under any circumstances to three hundred and twenty acres. This, to our minds, is the only fair construction which can be given to the act, and finds support in the fact that in 1891 the legislature so amended the law that an applicant for the purchase of tide lands is, since that time, only required to swear that he had not made any previous purchase of similar lands, which, together with those described in his application, exceeds three hundred and twenty acres. Under this view, Warren was not a qualified purchaser at the time he made the application to purchase the tide lands in controversy, and therefore the plaintiffs have no standing in a court of equity to proceed against the defendant to have her declared the holder of the legal title subsequently acquired in trust for them on account of any contract or agreement the Board of School Land Commissioners may have been induced to make with Warren by reason of his false affidavit and application. It is true that under the construction thus adopted a non-settler might, as suggested by counsel, have purchased one hundred and sixty acres of land belonging to the class defined in section 3, and thereafter purchase one hundred and sixty acres of tide land, or three hundred and twenty acres in all, while, if he first purchased one hundred and sixty acres of tide land, he could not thereafter purchase any of the other class. So that the quantity of land which he might lawfully purchase would depend upon the order in which he made his applications,—an incongruity which the legislature recognized and remedied in 1887: Laws, 1887, p. 73; Hill's Ann. Laws, § 3618.

2. The contention is also made that the defendant has

no right to question the regularity of the sale to Warren, or of his qualifications to purchase, as such questions can be raised only by the state in a direct proceeding, or by some one having superior equities to those of the plaintiffs. There would be much force in this argument if the state had in fact conveyed to Warren the land intended to be purchased by him, prior to the date of the conveyance to defendant. But he has no title whatever to the premises in controversy. The plaintiffs are attempting to assert some equity which they claim to be superior to that of the defendant, who is the holder of the legal title by conveyance from the state; but before they can prevail in such a proceeding they must show that their equities are superior to hers, and this they cannot do, because it appears that Warren was not a qualified purchaser from the state, and therefore had no right to purchase the land at the time he applied for it, nor did he acquire any rights by such application which a court of equity will enforce as against a subsequent purchaser of the legal title. It follows from these views that the decree of the court below must be affirmed, and it is so ordered.

AFFIRMED.

Decided 5 December, 1898; rehearing denied 3 April, 1899.

STATE v. TURNER.

[55 Pac. 92.]

PILOTS AND PILOTAGE.*—A master of a tugboat which is towing a vessel lashed alongside, who directs the movements of the tow by orders to its crew from the tug, is not a pilot, and is not engaged in an act of pilotage under section 1908, Hill's Ann. Laws.

PILOT DEFINED.—A pilot is a person who boards a vessel at a particular place for the purpose of guiding her through a channel, or from or into a port.

*NOTE.—The authorities on the liability of a vessel or its owner for compulsory pilotage fees are found in a note to *Clayton v. Hebb*, 39 L. R. A. 177. See, also, a note on pilots and their charges, 27 Am. St. Rep. 557.—REPORTER.

From Clatsop : THOS. A. McBRIDE, Judge.

Joseph Turner appeals from a judgment fining him \$25 for acting as a pilot for a sailing vessel on the Columbia River without a pilot's license.

REVERSED.

For appellant there was a brief over the names of *Williams, Wood & Linthicum*, and *C. R. Thomson*, with an oral argument by *Mr. Stewart Brian Linthicum*.

For the state there was a brief over the names of *Cicero M. Idleman*, Attorney-General, *T. J. Cleeton*, District-Attorney, *James Gleason*, and *Fulton Bros.*, with an oral argument by *Messrs. Idleman and Gleason*.

MR. JUSTICE MOORE delivered the opinion.

The defendant was convicted of piloting on the Columbia River without a license ; and, having been sentenced to pay a fine of \$25, he appeals, assigning certain alleged errors, only one of which requires consideration in determining the issues presented.

The undisputed facts are that defendant has not been licensed as a pilot by the Board of Pilot Commissioners of the State of Oregon, nor was he the master or owner of the vessel which he was accused of piloting. He was, however, master of the steam tug *Oklahoma*, and on May 7, 1897, ran her alongside of, and made fast to, the Japanese bark *Tenkio Maru*, which he towed in the Columbia and Willamette rivers from Astoria to Portland, arriving at the destination the next day. The defendant, being unable to steer the tow by the rudder of the tug alone, gave orders from the pilot house of the steamer to the Japanese sailors, who steered the bark under his directions. He offered to show that he was

duly licensed as master and pilot of steam vessels, and authorized by the Federal Inspector of Steamboats to navigate the waters of the Columbia and Willamette rivers and their tributaries; but the court, holding that such license afforded no defense to the action, refused to permit it to be received in evidence, to which ruling defendant excepted.

It is contended by defendant's counsel that the bark having been made fast to the side of the tugboat rendered them a single vessel under steam; that their client having been duly licensed, under the laws of the United States, as a master and pilot of steam vessels, had the right, while on board of the tugboat, to direct its course, and in doing so was authorized, when necessary, to demand and receive the assistance of those who operated the rudder of the tow, to enable him to keep the tugboat in the channel, in view of which no offense was committed by him in towing the vessel over the pilot grounds, and hence the court erred in refusing to discharge him when the state rested. In considering the question presented, it will be assumed that defendant had been duly licensed as a master and pilot of steam vessels, under the laws of the United States; and, if such license constituted a defense to the action, it necessarily follows that the court erred in refusing to permit it to be received in evidence.

A tugboat is not a public carrier, and hence is not an insurer of the vessels towed by her, notwithstanding which, to avoid accidents to such vessels resulting from the ignorance or carelessness of the master of the tug, certain rules in aid of navigation have been adopted by the courts, one of which is that when a tugboat is lashed to a tow, the identity of the latter, so long as this union exists, is merged in the former, and under this legal fiction they are treated as a single vessel under steam:

16 Am. & Eng. Enc. Law (1 ed.), 319; *The Johnson*, 76 U. S. (9 Wall.), 146; *The Northern Belle*, 76 U. S. (9 Wall.), 526; *Sturgis v. Boyer*, 65 U. S. (24 How.) 110; *The Civitta*, 103 U. S. 699; *The Pennsylvania*, 3 Ben. 215, Fed. Cas. No. 10,946; *The Merrimac*, 2 Sawy. 586, Fed. Cas. No. 9,478; *The Fred W. Chase*, 31 Fed. 91; *The Bordentown*, 40 Fed. 682; *The Columbia*, 19 C. C. A. 436, 73 Fed. 226; *Sproul v. Hemmingway*, 14 Pick. 1 (25 Am. Dec. 350). The application of this rule makes the tugboat liable to the vessel to which she is attached for any injury which the latter may sustain in consequence of the want of reasonable skill and care on the part of the master of the tugboat, whose mind controls the movements and directs the course of the united vessels thus committed to his charge. It has been held that this unity of power and weight imposes upon the master of the tugboat the duty of knowing the location and character of all obstructions to navigation that may be discovered by the exercise of reasonable diligence; to be acquainted with the various configurations of the bottom of the channel, the course thereof and the depth of water thereon; and also to understand the velocity of the current, the state of the tide, and the effect of the wind, so far as either may tend to divert the combined vessels from pursuing their proper passage. *The Lady Pike*, 88 U. S. (21 Wall.), 1; *The Margaret*, 94 U. S. 494; *The Effie J. Simmons*, 6. Fed. 639; *The Henry Chapel*, 10 Fed. 777; *The Narragansett*, 20 Fed. 394; *The Ellen McGovern*, 27 Fed. 868; *The Robert H. Burnett*, 30 Fed. 214. When a steam tug is engaged to tow a vessel in charge of a pilot, the captain of the tug is bound to obey the orders of the pilot, whose duty it is to superintend her navigation: *The Energy*, 3 L. R. Adm. & Ecc. 48. When given charge he becomes *pro hac vice* the master of the tow, whether he occupies a position

upon her deck, or upon the boat which furnishes the motive power. *Wilson v. Charleston Pilot's Association*, 57 Fed. 227. With these preliminary observations upon the unity of the tug and tow, and of the duty which the master of the tug owes to the tow when acting in the dual character of pilot and master, the statute relating to pilotage will be examined, with a view of ascertaining what acts constitute a violation thereof.

An act of the legislative assembly, approved October 20, 1882 (Laws, 1882, p. 15), incorporated in Hill's Ann. Laws as sections 3892 *et seq.*, defines the pilotage grounds of the Colombia River Bar, and of the Columbia and Willamette rivers and their tributaries; creates a board of pilot commissioners, and authorizes the members thereof to license pilots therefor; exempts from pilotage dues vessels engaged in the whaling or fishing trade, and such as are licensed and engaged exclusively in the coasting trade between any port in this state and other Pacific Coast ports; and prescribes pilotage dues. Section 26 of the act, being section 1908, Hill's Ann. Laws, provides the following penalty for piloting a vessel without a license, to wit: "Any person who pilots any vessel upon or over the bar or river pilot grounds, not being then a licensed pilot therefor, nor the master or owner thereof, or any pilot who shall demand or receive any greater compensation for piloting a vessel over or upon either of said grounds than is allowed by law, is guilty of a misdemeanor, and upon conviction thereof shall be punished by imprisonment in the county jail not more than six months, or by a fine of not more than \$500, or by both such imprisonment and fine." It is contended by counsel for the state that the taking of the bark over the pilot grounds from Astoria to Portland, in the manner stated, was an act of pilotage within the meaning of the statute,

while defendant's counsel insist that the act complained of constitutes the performance of a towage contract only. The case which best illustrates the point for which defendant's counsel contend is *Francisco v. People*, 4 Park. Cr. R. 139, in which it appeared that the pilot of a steam tug was indicted, tried, and convicted for violating a statute of New York, which provided that "if any person, other than a Hell Gate pilot, shall pilot for any other person any vessel of any description through the channel of the East River, commonly called Hell Gate, he shall * * * be deemed guilty of a misdemeanor," and on conviction thereof be punished, etc. It was also provided that the act should not be construed as applying to steamboats. It was proved at the trial that two schooners were lashed, one on each side of the steam tug of which Francisco was the pilot, and thus towed through Hell Gate; he being on the steam tug, piloting it, and making signals to those on board the schooners to change their helms to conform to the movements of the steamer. At the trial the court was requested to charge the jury that, if they believed the act done in the manner stated was one of towage only, the defendant must be acquitted. The judge gave the charge requested, with the qualification that if the accused directed the movements of the steamer, and was the controlling spirit, the act complained of was one of pilotage.

An exception to the charge as given having been taken, the court, in reversing the judgment, say: "Bouvier's Law Dictionary defines a pilot to be—First, an officer serving on board of a ship during the course of a voyage, and having the charge of the helm and of the ship's route; and, secondly, an officer, authorized by law, who is taken on board at a particular place for the purpose of conducting a ship through a river, road, or channel, or from or into a port. This definition would seem to carry

the idea that the pilot is to be put on board the ship piloted ; that he is not, in the legal sense, a pilot unless on board the ship which he is conducting through a river or channel. Could he be said to be a pilot, if he stood on the shore, and directed the course of the vessel by signals, or ran along the bank of the stream, and by words or signs controlled and directed the course of the vessel navigating the stream? We think not, and that the intendment of the act was to apply to pilots on board, piloting or directing the ship or vessel while on board of it. The defendant was conducting the steam tug through the channel of the East River, as he lawfully might do. The two schooners which it is claimed he piloted were lashed to the steamboat, and must necessarily obey its every motion. As a consequence, they were piloted through the channel ; and so they would have been, if placed on the deck of the steamer. It is true, the persons on the schooners had to obey, and did obey, signals given to them by the defendant while on board the steamer. He might have given the same if on the land, but we do not see that this circumstance determines that he was piloting the schooners." After that decision was rendered, and probably in consequence of its effect, the legislative assembly of New York amended the statute in question by inserting the words "or tow" after the words "shall pilot." After the statute had been so amended it was held that a person not licensed as a pilot under the laws of that state, but who, in pursuance of a license issued under the laws of the United States, was in charge of a steamboat, and towed a schooner through Hell Gate, violated the provisions of the act : *People v. Sperry*, 50 Barb. 170.

The decision in *Francisco v. People*, 4 Park Cr. R. 139, seems to rest upon the position occupied by the person in charge of the tugboat while directing her course and

that of the tow, and to decide, in effect, that, if not actually on board the tow, he is not to be considered or treated as her pilot. In considering this view of the law, an examination of the meaning of the word as now understood, becomes important. Bouvier, as authority for the definition quoted in *Francisco v. People*, cites Abb. Shipp. The preface to the first edition of that work shows that its author (afterward Lord Tenterden) completed it January 25, 1802, during which year it was published: 3 Campbell's Lives of the Chief Justices of England, 275. The thirteenth edition, which contains the text of the fifth edition as compiled by the author, contains at page 189 the following explanation of the definition given by him: "In England the term 'pilot' is now invariably used to designate a person of the second class mentioned by Lord Tenterden, namely, 'a person taken on board at a particular place for the purpose of conducting a ship through a river, road, or channel, or from or into a port,' and wherever the word is used henceforth in this treatise it is in reference to a person so employed." It will be remembered that in 1802 steam had not yet been applied as a motive power to vessels, at which time pilots probably boarded incoming vessels from a pilot boat, and conducted them into port; and the definition formulated by Lord Tenterden was undoubtedly correct at the time it was announced. While pilot boats still cruise about the entrance to harbors, on the lookout for incoming vessels, that a pilot may be placed thereon to conduct them into port, it is very evident that the person having charge of and remaining on a tugboat which tows a vessel into or out of a port, or through a roadstead, is as much a pilot as if he occupied a station on board the tow: *Wilson v. Charleston Pilot's Association*, 57 Fed. 227. The use of steam as a motive power has

materially increased the importance of navigation, and, this being so, the definitions of terms once applicable have become obsolete, or, if they relate to the original subjects, should be expanded to suit the changed condition of the times.

The important question to be considered is, who is a pilot, within the meaning of the word as intended by the legislative assembly by the use thereof in the act of October 20, 1882? Section 26 of said act is penal, but this does not necessitate a strict construction; for section 2050, Hill's Ann. Laws, in prescribing the method for the interpretation of such statutes, reads: "The rule of the common law that penal statutes are to be strictly construed has no application to this Code, but all its provisions are to be construed according to the fair import of their terms, with a view to effect its objects and to promote justice." In *Steamship Co. v. Joliffe*, 69 U. S. (2 Wall.), 450, Mr. Justice FIELD, in construing a statute of California creating a board of pilot commissioners, which was authorized to license pilots, says: "The object of the regulations established by the statute was to create a body of hardy and skillful seamen, thoroughly acquainted with the harbor, to pilot vessels seeking to enter or depart from the port, and thus give security to life and property exposed to the dangers of a difficult navigation." Such must also have been the intention of the legislative assembly of this state, for the bar pilots are required to maintain, and at all times, unless prevented by tempestuous weather, to keep a pilot schooner cruising outside the Columbia River Bar, supplied with provisions and water for the relief of distressed vessels, and to extend aid to all vessels in stress of weather, or in case of disaster: Hill's Ann. Laws, § 3912. To compensate such pilots for the hazard of their lives in the cause of humanity, the act makes pilotage dues compul-

sory to all vessels not exempted therefrom, thereby creating a fund to reward these pilots for the faithful performance of their duties. But if the master of a tugboat can tow a vessel over the Columbia River Bar, and escape the penalty prescribed by the act, because he directs the course of the tow from the deck of his steamer, then it follows that the objects of the statute are defeated and justice thwarted, the effect of which must inevitably result in the retirement of the bar pilots and the abandonment of their schooner. The degree of danger to life and property which may be encountered at the bar is not to be apprehended in navigating the Columbia River, but the difference in the risk assumed by the pilots on these several pilot grounds is one of degree only; and, this being so, the necessity for providing pilots for that stream, and making the dues therefor compulsory, is a legislative, and not a judicial question, in view of which the reason for the retention of the bar pilots is applicable also to the maintenance of the river pilots.

These considerations, in the light of the rule prescribed in the Code for the construction of penal statutes, lead to the conclusion that the legislative assembly intended to limit the term as used in the act in question to mean that a pilot is a person whose mind dictates the course and controls the movements of a vessel in its passage through the waters of a channel, the configuration of the bottom of which, and all obstructions to navigation therein, he is presumed to know. Defendant's mind undoubtedly directed the course and controlled the movements of the bark which his craft was towing, and, under the definition given, he was a pilot thereof, and liable for a violation of the provisions of the statute, unless his license under the laws of the United States excused his act. In *Chapman v. Jackson*, 9 Rich. Law, 209, it is held that the act of congress of 1852, requiring certain

steam vessels to have on board a pilot for the voyage, did not supersede the laws of the different states relative to pilots for ports and harbors, and that such pilots for the voyage must, on entering a port or harbor, give place to a local pilot. To the same effect, see, also, *Steamship Co. v. Joliffe*, 69 U. S. (2 Wall.) 450; *The George S. Wright*, Deady, 591, Fed. Cas. No. 5,340; *Cisco v. Roberts*, 36 N. Y. 292. These decisions proceed upon the theory that a person licensed as a master and pilot under the laws of the United States was authorized to navigate steam vessels on the high seas, but that such license was intended to expire with the coast voyage of the vessel: *Thompson v. Sprague*, 69 Ga. 409 (47 Am. Rep. 760). In the case at bar, however, defendant was licensed, in pursuance of the laws of the United States, as master and pilot of steam vessels on the Columbia and Willamette rivers and their tributaries, and under sections 4401, 4444, Rev. Stat. U. S., when construed in *pari materia*, was probably entitled to pilot "coastwise steam vessels" upon the waters named in his license without interference on the part of the state authorities. Mr. Chief Justice JACKSON, in *Thompson v. Sprague*, 69 Ga. 409 (47 Am. Rep. 760), speaking of the authority of masters of steam vessels to pilot them within bars and up the rivers of a state, says: "If they have such license from the United States authorities to pilot there, then no state law shall require an additional license, and enforce the collection of the fees of a pilot so licensed by the state; but, if there be no licensed pilot by the United States authority to pilot the steamer within the bar and up the river, then the state law remains of force."

It would seem from these authorities that the master of a tugboat, who had been licensed by authority of the federal government to pilot steam vessels over a bar, into or out of a port, or upon a river, might exercise a

dominant mind and control while towing upon such grounds any vessel that was exempt from pilotage dues, and also, in the absence of any state regulations upon the subject, might control in like manner while towing all vessels thereon, in which cases the tugboat commanded by him would be liable to the vessels towed for any injury resulting to them from his want of skill or care in their management, or his lack of knowledge of the dangers incident to the navigation. But when a pilot licensed under state authority assumes command of a vessel which is subject to compulsory pilotage, he becomes *ipso facto* the controlling mind of the tow and its tug (*The Energy*, 3 L. R. Adm. & Ecc. 48), which necessarily relieves the master of the tug from all duties towards the tow which the law otherwise enjoins, except that of furnishing the motive power.

From these views, I conclude that the court committed no error in refusing to permit the defendant's license as a master and pilot of steam vessels under the laws of the United States to be received in evidence, or in refusing to discharge the defendant, and that the judgment should be affirmed. My associates, however, are of the opinion that under the rule of a literal interpretation as adopted in *Crawford v. Linn County*, 11 Or. 482 (5 Pac. 738), the legislative assembly intended to use the word "pilot" in the act in question in the technical sense which it had acquired by reason of Lord Tenterden's definition of the term, and that the conclusion reached by the court in *Francisco v. People*, 4 Park. Cr. R. 139, is decisive in the case at bar, in view of which the judgment is reversed, and the cause remanded to the court below, with instructions to discharge the defendant.

REVERSED.

Decided 8 April, 1899.

ON REHEARING.

[56 Pac. 645.]

MR. JUSTICE BEAN delivered the opinion.

The defendant was indicted and convicted for piloting a vessel over the Columbia River pilot grounds without being a licensed pilot, in violation of the act of 1882: Laws of 1882, p. 15, Hill's Ann. Laws, §§ 3892, *et seq.* The undisputed evidence shows that, at the time complained of, he was the master of a steam towboat engaged in towing a vessel, subject to compulsory pilotage, over the river pilot ground between Astoria and Portland, and the question is whether, under such circumstances, he was a pilot within the meaning of the act referred to, and guilty of violating its provisions. This act was evidently designed to regulate and control an established and recognized business. It does not define the term "pilot" as used therein, and, therefore, it must be taken in the sense ordinarily ascribed to it, that is, one whose business and calling is to take charge and control of a vessel at a particular place for the purpose of conducting or guiding her through a river or channel, or from or into a port: 2 Bouvier's Dic., "Pilot;" *Steamship Co. v. Joliffe*, 69 U. S. (2 Wall.), 450. Whether, to be a pilot within the meaning of the statute, it is necessary for the person so taking charge or control of a vessel to be aboard of her, as would seem to be required by the technical definition of that term as sometimes given, is immaterial in this case, because there is a manifest distinction between a pilot and the master of a towboat, and, so far as we have been able to ascertain, it has never been held under pilotage acts

similar to ours that the master of a towboat engaged in moving or towing a vessel is to be deemed a pilot within the meaning of the law. The only adjudged cases in point which either counsel or court has been able to find, after a somewhat extended search, are *People v. Francisco*, 10 Abb. Pr. 30 (S. C. 4 Park. Crim. R. 139), and *Doe v. Gilbert*, 7 M. & W. 102, in both of which it is held that the master of a towboat engaged in a *bona fide* towage service, is not a pilot within the meaning of statutes substantially the same as ours. So, that even if the technical definition of a pilot, as given by Lord Tenterden, is inapplicable to the act under consideration, the conclusion reached in the former opinion is sound. The petition for a rehearing will therefore be denied.

REHEARING DENIED.

Decided 30 January, 1890.

BAILEY v. WILSON.

[55 Pac. 973.]

34 186
40 452

1. ACTION ON BOND—PLEADING.—A complaint upon an insurance agent's bond alleging that the principal had received various sums which he had failed to pay over, and that upon an accounting and settlement with reference thereto a specified sum was ascertained and determined to be due, which the principal promised and agreed to pay, does not declare upon an account stated, but upon a claim for damages resulting from a breach of the bond.
2. AMENDMENT BY STRIKING OUT.—Any amendment of a complaint that will aid the pleader in stating more clearly the cause of action originally intended to be set out should be allowed, if such intention is to be ascertained from the complaint, though care must be taken not to allow the cause of action to be changed, as, for example, an account stated to an open account: *Foste v. Standard Insurance Co.*, 26 Or. 449, cited.
3. NONSUIT—COUNTERCLAIM—JUDGMENT.—Where defendant sets up new matter as a counterclaim which is denied in reply, and afterward such counterclaim is stricken out, whereupon plaintiff takes a nonsuit, the defendant cannot possibly be entitled to judgment on the counterclaim, even if it was improperly stricken out, for it has been put in issue.

From Multnomah: E. D. SHATTUCK, Judge.

Action by James D. Bailey against Arthur Wilson and others, which finally resulted in a voluntary nonsuit for plaintiff, from which defendants appeal.

REVERSED.

For appellant there was a brief over the name of *Williams, Wood & Linthicum*, with an oral argument by *Mr. Stewart Brian Linthicum*.

For respondent there was a brief over the name of *Chamberlain & Thomas*, with an oral argument by *Mr. Warren E. Thomas*.

MR. JUSTICE BEAN delivered the opinion.

This is an action upon an insurance agent's bond. The second amended complaint, upon which the cause was tried, alleges that in January, 1894, the plaintiff, as the general agent of the Insurance Company of North America, appointed the defendants Wilson and King agents in Portland to solicit insurance for and on behalf of such company, and to receive and remit premiums therefor; that before entering upon the discharge of their duties as such agents they were required to, and did, execute and deliver to the plaintiff, as such general agent, their joint and several obligation in the sum of \$10,000, with the defendants Knapp and Maxwell as sureties, conditioned that they should well and truly pay over to the plaintiff all moneys which they should receive for and on account of said company whenever and as soon as such money should become due and payable, and in all other respects well and truly perform the duties usually performed by such agents; that the conditions of said obligation have been broken and violated, in this: that between the first day of January, 1894, and the first of October, 1894, they, "as agents aforesaid,

received for and on account of said company a large amount of premiums from various persons, firms and corporations, amounting to a large sum, and that thereafter, and on or about the ninth day of October, 1894, the plaintiff and the defendants Arthur Wilson and W. B. King had an accounting and settlement between them as to the amount of money and the particular premiums collected by them as such agents between said dates and for which they had not remitted to plaintiff, and upon such accounting and settlement there was ascertained, agreed and determined to be due the plaintiff herein the sum of \$1,039.93, and said defendants thereupon promised and agreed to pay the same," which they have failed and neglected to do, except the sum of \$27.28, paid prior to the commencement of the action; to plaintiff's damage in the sum of \$1,012.13.

The defendants Wilson and King, by their answer, admitted their appointment, the execution and delivery of the bond, and that of the premiums collected by them, the sum of \$997.49, had not been paid over to the plaintiff, but denied that the conditions of their obligation had been broken in any respect, or that an accounting or settlement had been had between them and the plaintiff; and as a further and separate defense, and by way of counterclaim, allege that their appointment was to continue for one year, and so long thereafter as should be mutually satisfactory, and that they were to receive certain commissions as payment for their services,—it being further agreed that no other agents should be appointed in their district while they were so acting; that they entered upon the performance of their contract, and faithfully discharged their duties, and expended a considerable sum of money in advertising, but that shortly after their appointment plaintiff violated his contract with them by appointing another agent to solicit insur-

ance in their district, and subsequently, about August 4, 1894, and without fault, discharged them as agents, and substituted others in their stead, to their damage in the sum of \$1,500. The answer of the defendants Knapp and Maxwell, sureties, was similar in effect to that of Wilson and King, and prayed judgment against plaintiff for costs. Issue was joined upon the allegations of these answers by the replies.

On the trial the defendants objected to the admission of certain evidence offered by the plaintiff to prove the amount of premiums collected by the defendants, and not remitted, on the ground that the complaint alleged a cause of action on an account stated, which the evidence offered did not tend to prove; and, although the court so construed the complaint, it overruled such objection, and admitted the testimony in evidence, notwithstanding the plaintiff did not claim or pretend that it tended in any way to prove an account stated, or that the action was of that character. At the conclusion of plaintiff's case, the defendants moved the court to direct a verdict in their favor upon the affirmative matter of the answers, alleging as ground therefor that no evidence had been offered or introduced tending to prove an account stated.

• This motion was likewise overruled, whereupon the defendants proceeded to give evidence; and while one of their witnesses was on the stand, and after the court had repeatedly ruled that the action was upon an account stated, the plaintiff moved to strike out all that part of the amended complaint in reference to the accounting with Wilson and King, so as to avoid any question upon that subject, but the court denied the motion. The plaintiff, being thus compelled to proceed, if at all, upon a cause of action which he had not intended to allege, and which he was unable to and had not attempted to prove, and being unable to take a voluntary nonsuit on account

of the new matter set up in the answer, thereupon moved the court to strike out such new matter, for the reason that, if the complaint was based upon an account stated, as the court had ruled, the matters and things set up in the answer must necessarily have been included in such accounting, and were, therefore, not open to the defendants as a counterclaim. This motion was sustained, and the separate defenses of the defendants stricken out, whereupon the plaintiff was allowed to take a voluntary nonsuit, and from the judgment entered thereon the defendants appeal. The record contains fifteen assignments of error, but they have been classified in defendants' brief as follows: First, error in striking out defendants' affirmative defense and counterclaim; second, error in granting plaintiff's motion for a nonsuit; third, error in not directing a verdict for defendants when plaintiff had rested; and, fourth, exceptions taken to testimony introduced by the plaintiff, and to the court's refusal to strike the same out on the ground that such testimony did not tend to prove an account stated.

1. The assignments of error based on the action of the court in striking out the defendants' affirmative defense and counterclaim, and in allowing plaintiff a voluntary nonsuit are well taken, but such action was the logical sequence of the fundamental error which prevailed throughout the entire proceeding, and which caused all the confusion in the case, viz. that the action was upon an account stated. As we read the complaint, it is plainly and clearly an action for damages for the breach of a bond given by the defendants Wilson and King to the plaintiff, and is not upon an account stated, notwithstanding the allegation in reference to the accounting. It is true, this allegation, if taken by itself, would indicate that the action was of that character, but when it is taken in connection with the entire complaint,

and the evident theory upon which the action was brought, it is apparent, it seems to us, that such allegation does not determine the nature of the action. And especially is this true when, by striking out of the complaint all the allegations in reference to the accounting, sufficient remains to constitute a good cause of action for a breach of the bond.

2. But it is claimed that if this allegation is eliminated from the complaint it will result in changing the action from one upon an account stated to one upon an open running account, and that such an amendment on the trial is not permissible, and this was the opinion of the trial court. The rule is that where a party brings an action upon an account stated he cannot upon the trial so amend his complaint as to change it to a cause of action upon an open account: *Foste v. Insurance Co.*, 26 Or. 449 (38 Pac. 617); but, as said in the case referred to, any amendment which will aid the complaint in stating the cause of action as originally intended by the pleader is permissible if, as here, sufficient facts are alleged to indicate such intention. It was, therefore, clearly within the power of the court to have allowed the motion to strike out all the allegations in the complaint in reference to the alleged accounting, and, if sufficient remained to constitute a cause of action for a breach of the bond, the case should have been allowed to proceed.

3. But, although the court was in error in striking out the affirmative matter contained in the answer, and in giving judgment of nonsuit, the defendants were not entitled to a judgment in their favor upon the new matter set up by them, because the facts therein alleged were put in issue by the reply, and thus an issue of fact was formed which could only be determined upon the testimony. From the foregoing it follows that the judgment

must be reversed, and the cause remanded to the court below for a new trial upon the issues presented by the complaint, answer, and reply, and it is so ordered ; costs on appeal to abide the final determination of the case.

REVERSED.

Decided 8 January, 1899.

MALONE v. CORNELIUS.

[55 Pac. 536.]

34 1899
41 537

1. WRIT OF REVIEW.—A writ of review is a proper means of bringing into the circuit court the probate proceedings of a county court in some cases: *Kirkwood v. Washington County*, 32 Or. 508, and *Garnsey v. County Court*, 33 Or. 201, followed.
2. RIGHT TO WRIT OF REVIEW.—An heir and legatee under a will that is presented for probate is injuriously affected in a "substantial right" by the refusal of the county court to take proof of the will, so as to be entitled to a writ to review the proceedings.*
3. PROBATING WILL.—ADVERSE PARTIES.—In probating a will in Oregon there are no "adverse parties" to be notified, since the proceeding is entirely *ex parte* (*Hubbard v. Hubbard*, 7 Or. 42, cited), and it is the duty of the county court to probate a will with convenient speed after its presentation, and no one is entitled to notice as a matter of right.
4. EFFECT OF PROBATING WILL.—Where a will is admitted to probate, and letters issued thereunder, the powers of any administrator who may have been appointed cease immediately.

From Washington : THOS. A. McBRIDE, Judge.

Writ of review brought by Mary Malone against B. P. Cornelius, county judge, and others, to review the action of the county court in refusing to proceed with the probate of a will. From the judgment rendered, B. P. Cornelius and others appeal.

AFFIRMED.

*The statute on this point is as follows: "535. The writ shall be concurrent with the right of appeal, and shall be allowed in all cases where the inferior court, officer, or tribunal, in the exercise of judicial functions, appears to have exercised such functions erroneously, or to have exceeded its or his jurisdiction, to the injury of some substantial right of the plaintiff, and not otherwise."

For appellant there was a brief and an oral argument by *Mr. Thos. H. Tongue*.

For respondents there was a brief over the names of *Whalley & Muir*, and *Smith & Bowman*, with an oral argument by *Mr. John W. Whalley*.

MR. JUSTICE BEAN delivered the opinion.

This is an appeal from a judgment of the Circuit Court of Washington County, vacating and annulling, on writ of review, an order and decree of the county court of such county, made in the matter of the estate of Edward Constable, deceased. The facts are that on August 21, 1895, an *ex parte* order of the county court was made, appointing one Elizabeth Shute administratrix of the estate on her own petition, in which she stated, among other things, that the deceased left an instrument purporting to be his last will and testament, but that it was executed through undue influence of one of his daughters, and while he was afflicted by age and infirmities to such an extent that he was incompetent to make a will, and that the subscribing witnesses thereto were unwilling to testify that he was of sound and disposing mind at the time of its execution. On the same day the plaintiff, an heir of the deceased, and a legatee under the alleged will, filed a petition in the county court in due form, praying for the probate of such will, and that letters testamentary be issued to the executor named therein. At the hearing thereof counsel for the petitioner read in open court the petition, and the paper purporting to be the will sought to be probated, and offered to prove its due execution, and the testamentary capacity of the testator, by the subscribing witnesses, who were then present and ready to testify, for the purpose of

having the will admitted to probate in common form ; but the court, apparently on its own motion, refused to permit such witnesses to testify, or to allow any further proceedings in the matter, unless Mrs. Shute, the administratrix theretofore appointed, and the heirs of the deceased, be cited to appear, and, the plaintiff declining to take such action in the premises, her petition was denied. She thereupon sued out a writ of review, which resulted in a judgment reversing and setting aside the order of the county court, and directing such court and judge thereof to proceed with the hearing and determination of the petition of plaintiff for the probate of the will in common form without citation. From such judgment this appeal is taken.

1. It is claimed that a writ of review will not lie to bring up the proceedings of the county court sitting for the transaction of probate business, but this question is settled adversely to such claim by *Kirkwood v. Washington County*, 32 Or. 568 (52 Pac. 568), and *Garnsey v. County Court*, 33 Or. 201 (54 Pac. 1089).

2. It is next claimed that the proceeding sought to be reviewed did not affect any substantial rights of the plaintiff, and hence she was not entitled to the writ. But it appears that she was not only the petitioner for the probate of the will, but one of the heirs and legatees of the testator, and therefore an erroneous refusal of the county court to take proof of the will injuriously affected her substantial rights.

3. Again, it is claimed that the writ of review should have been quashed, because a copy thereof was not served upon Mrs. Shute, the administratrix theretofore appointed, and the other heirs of the estate, whom it is argued are adverse parties to this proceeding. This necessarily brings us to a consideration of the merits, for, if the persons referred to are adverse parties to this proceeding,

they were clearly necessary parties to the proceeding for the probate of the will in the first instance, and the county court did not err in refusing to proceed in the matter until they had been cited to appear. On the other hand, if they were not necessary parties to the proceeding in the probate court, they are not adverse parties here. At common law there were two modes of proving a will: the solemn form, in which all the parties interested were cited to appear at the time of probate, and in which the order admitting the will to probate was conclusive upon all the parties so cited unless fraud or collusion could be shown; and the common form, in which the will was proved and admitted to probate *ex parte*, without citation to any one, and in which the probate could be called in question by interested parties, and the executor required to re-probate the will *de novo* by original proof in the same manner as if no probate thereof had been had. Both of these modes have been adopted in several of the states by statute, but in this state the common form is the only one which has been adopted: *Hubbard v. Hubbard*, 7 Or. 42. Under our statute no citation is necessary or required, but the probate of a will is wholly an *ex parte* proceeding. It is made by the presentation of the will to the proper county court, together with a verified petition for its admission to probate, setting forth facts necessary to give the court jurisdiction, and the production of competent evidence of its validity. Whenever an instrument purporting to be the last will and testament of a deceased person is presented for probate, it is the duty of the court to hear the witnesses as to its due execution, and, if they show *ex parte* the instrument offered to be the will of the deceased, it must be admitted to probate, and letters testamentary issued as a matter of course. If any one interested thereafter wants to contest the will, he must file his complaint, or allegations of contest, and

thereupon the burden of proving the will in solemn form is imposed on the proponent. The admission of the will to probate under our statute is done upon the principle that it is valid in all respects, and the judgment of probate is conclusive until overturned in some proper proceeding. The County Court of Washington County therefore exercised its judicial functions erroneously in refusing to proceed with the probate of the will in question until Mrs. Shute and the other heirs of the estate had been cited to appear. The fact that Mrs. Shute had been appointed administratrix of the estate does not entitle her to notice of the intended probate of the will.

4. If she was appointed under Section 1091, Hill's Ann. Laws, because of some delay in issuing letters testamentary, her powers ceased immediately upon the admission of the will to probate, and the issuing of letters testamentary; and, if she was appointed on the theory that the deceased died intestate, it was the duty of the court, upon the subsequent production and proof of the will, to immediately revoke the administration previously granted, and to issue letters testamentary to the executor named in the will, without any notice whatever to her. From these views it follows that the judgment of the court below must be affirmed, and it is so ordered.

AFFIRMED.

Decided 24 November, 1896.

STATE EX REL. v. ESTES.

[51 Pac. 77; 52 Pac. 571; 55 Pac. 25.]

1. **STATE MEDICAL BOARD—RIGHT TO APPEAL.**—Under the provisions of the law of 1895 creating the Board of Medical Examiners (Laws, 1895, p. 61), such board may appeal to the supreme court from a judgment of the circuit court reversing its decision on the question of revoking a physician's license.
2. **NOTICE OF APPEAL—AUTHORITY OF ATTORNEYS.**—A notice of appeal from the circuit court, signed by the attorneys in behalf of a board, which signa-

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ture was authorized by the president of the board, and afterwards ratified by the rest of the members, is sufficient, so far as the attorneys' authority is concerned, to give the supreme court jurisdiction.

3. **APPEAL—DEFECT OF PARTIES.**—An objection that there is a defect of parties to a suit or action cannot be first urged on appeal.
4. **SERVICE OF NOTICE OF APPEAL.**—A proceeding by the state on the relation of sundry persons to revoke the license of a physician is *quasi* criminal in its nature, and a service of the notice of appeal on the state is sufficient, it need not be served on either the relators or the State Board of Medical Examiners.
5. **AMENDING BILL OF EXCEPTIONS AFTER APPEAL.**—A bill of exceptions which, through inadvertence or mistake has been incorrectly made up, may, by order of the trial court entered *nunc pro tunc* on proper notice, be so amended at a subsequent term that it will accord with the real facts, even though an appeal is pending.
6. **APPEAL—OBJECTION TO SERVICE OF NOTICE.**—A motion to dismiss an appeal to a circuit court for some technical error in the proceedings will not be considered in the supreme court unless the alleged error was specifically stated so that the circuit court could have considered it—in other words, such an objection, not affecting the jurisdiction, cannot be raised for the first time in the supreme court: *Hermann v. Hutcheson*, 38 Or. 239, followed.
7. **APPEAL—SUFFICIENCY OF MOTION TO DISMISS.**—Under the rule that one who claims an advantage on purely technical grounds must himself have complied with every such requirement, a claim that "no appeal bond as required by law" was given is not sustained by proof that the bond given was perfect, except that the liability of the sureties was limited, for the alleged error is not definitely pointed out.
8. **FILING TRANSCRIPTS—DUTY OF CLERK.**—Where a statute imposes on the clerk of the trial court, or the secretary of a board, the duty of filing the transcript on appeal, and the officer has complied therewith so far as the filing is concerned, the fact that the certificate authenticating the transcript was irregular, so that it had to be amended, which was not done until after the expiration of the time allowed to file such transcript, does not make appellant responsible for such delay, or affect the appeal.
9. **MEDICAL BOARD—APPEAL—VENUE.**—An appeal from the Board of Medical Examiners will not be dismissed where the motion to dismiss recites that the hearing by the board was in the county to the circuit court of which the appeal has been taken as required by law, and the verdict and decision of the board purports to have been made in that county, although the regular meetings of the board are required to be held in another county.
10. **COMPETENCY OF EVIDENCE.**—In a proceeding to revoke a physician's license for unprofessional conduct, testimony tending to show that one of defendant's patients had suffered an abortion was properly refused when counsel stated that he doubted if defendant could be connected with the offence.
11. **RIGHT TO RECOVER COSTS.**—The expenses incident to a trial cannot be recovered from the adverse party, except under a statute: *Wood v. Fitzgerald*, 3 Or. 569, 584.
12. **MEDICAL BOARD—COSTS.**—Costs are not recoverable by defendant in an action begun before the Board of Medical Examiners to revoke a physician's license, where the case was appealed by the defendant to the circuit court and reversed, since the statute makes no provision therefor.

13. REINSTATEMENT OF PHYSICIAN—POWER OF COURT.—That part of a judgment of the circuit court in an action appealed from the Board of Medical Examiners revoking a physician's license which adjudges that the defendant is entitled to practice medicine and surgery, as if the verdict and decision of the board had not been rendered, is erroneous in view of the statutory provision (Laws, 1895, p. 61, § 6), that if the circuit court reverses the action of the board and no appeal is taken to the supreme court within sixty days, the medical board shall immediately reinstate defendant's name upon the records of the board. The proper course is for the circuit court to direct the board to reinstate the accused.

From Clatsop: THOS. A. McBRIDE, Judge.

This is a proceeding commenced in the name of the state on the relation of O. H. Beckman and three other private citizens before the Board of Medical Examiners of the State of Oregon to obtain a revocation of the license of Dr. O. B. Estes under the provisions of the act of 1895 relating to physicians and surgeons. The board revoked the license, as prayed for, and defendant appealed to the circuit court, which reinstated him, without allowing any costs or disbursements, whereupon the board appealed to the supreme court, and the defendant filed a cross appeal on the question of costs.

In this tribunal a motion by defendant to dismiss the appeal of the board was overruled, and a simultaneous motion by the board to dismiss the cross appeal of defendant met a similar fate; whereupon a motion by the board to strike the amended bill of exceptions from the files, and a further motion to dismiss the cross appeal were denied; and thereafter the matter was considered on the merits. These are reported in the order of their occurrence, and the various statements of fact are given in connection with the respective opinions.

MOTIONS OVERRULED: JUDGMENT MODIFIED.

Decided 7 December, 1897.

ON MOTIONS TO DISMISS BOTH APPEALS.

[51 Pac. 77.]

Messrs. Cicero M. Idleman, Attorney-General, and *Chas. W. Fulton* for the Board of Examiners.

Mr. H. A. Smith for Dr. Estes.

MR. JUSTICE WOLVERTON delivered the opinion.

Complaint was filed with the Board of Medical Examiners, entitled, "State of Oregon, on relation of Oswald H. Beckman, E. Jansen, M. M. Walker, and Jay Tuttle, Plaintiffs, v. O. B. Estes, Defendant," charging the defendant with dishonorable and unprofessional conduct as a practicing physician. All the members of the board seem to have signed the complaint, and were complainants in the proceeding. The board revoked the license of the defendant, who appealed to the circuit court, and there procured a reversal of its decision. A notice of appeal from the judgment of the circuit court to this court by the board of examiners and the State of Oregon, signed by Fulton Bros., attorneys for said board, and the district attorney, for the state, was served upon the defendant, and the appeal perfected. The defendant moves to dismiss the appeal because: First, the board of examiners is not a party to the action, and as such has no authority to take an appeal; second, no action was ever taken by said board, authorizing the appeal, and the same was taken and prosecuted without its authority (this objection is based upon affidavits tending to show that Messrs. Fulton Bros. were not directed and author-

ized, by resolution or direct action of the board, to prosecute the appeal in its behalf); and, third, there is no authority of law for the state to become a party to such action or proceeding.

The act authorizing the organization of the Board of Medical Examiners (Laws, 1895, p. 61, 65, § 6) empowers it, among other things, to revoke the license of a practicing physician for unprofessional or dishonorable conduct. In case of a revocation, the licentiate is given the right of appeal to the circuit court in and for the county in which the hearing was had. Either party may appeal from the judgment of the circuit court to the supreme court, in like manner as in civil actions, within sixty days after the rendition thereof. Then follow these provisions: "If such judgment shall be in favor of the party appealing from the decision of said board, and in case said examining board does not appeal from judgment within sixty (60) days, then and in that case said board shall, at the end of sixty (60) days, and immediately upon the expiration thereof, issue to such successful party the usual license to practice medicine and surgery in this state, and, in addition thereto, shall reinstate upon the records of said board the name of such successful applicant in case of the revocation of his license by such board. In case of such appeal to the supreme court by said board, no such license shall be issued or reinstatement be required until the final determination of said cause, as hereinafter provided. In case the final decision of the supreme court be against said medical examining board, then and in that case said court shall make such order in the premises as may be necessary, and said board shall act accordingly."

1. It is difficult to determine from this crude piece of legislation just what procedure is meant to be established for taking and perfecting an appeal from the circuit to

the supreme court when the judgment is in favor of the accused practitioner. The language of the act, that "either party may appeal," would seem to allude more especially to the parties to the proceeding, and not to the tribunal charged with the function of determining the cause as between them. But the further provision above quoted is a plain recognition of the right—while not conferred in express terms—of the board also to appeal from the decision of the circuit to the supreme court in case the judgment should be adverse to its decision, and we think its effect is to empower the board to prosecute an appeal in vindication of its own findings. In this view, the first reason assigned as a ground of dismissal fails.

2. The notice of appeal appears to be regularly signed by Fulton Bros. as the attorneys for the board, but the respondent questions their authority to thus prosecute the appeal in its behalf, and urges that, unless it appears they were so authorized by resolution or other express direction of that body at the time of the service of such notice, this court has not acquired jurisdiction to hear the cause, and hence that it should be dismissed. An attorney, under the statute, is a public officer; and, when he appears in his official capacity, it will be presumed that it is with the requisite authority of the party whom he professes to represent, until the contrary is established. His mere appearance in such capacity will be taken as *prima facie* evidence of his authority for so doing, and ordinarily the courts will seek no further for confirmation of such authority. The statute has, however, made provision by which the court may, on motion of either party, based upon a proper showing, require the attorney for the adverse party to produce or prove the authority under which he appears, and until he does so may refuse to recognize him as such. Waiving all

question as to the proper time of making the application under this statute, we presume that if, in due time, the attorney failed to produce or prove his authority, or it should become manifest that he was acting without warrant from his supposed client, and that he was so acting for the moving party, the court would, upon motion, dismiss the proceeding: *Clark v. Willett*, 35 Cal. 534; *Dove v. Martin*, 23 Miss. 588; *King of Spain v. Oliver*, 2 Wash. C. C. 429 (Fed. Cas. No. 7,814). But in the case at bar Messrs. Fulton Bros. have produced a resolution of the board, adopted November 5, 1897, the genuineness of which is not questioned, whereby it appears that they took the appeal in pursuance of the directions of its president, and it purports to ratify and confirm their action in the premises. It is objected that the president was without power, in the first instance, to authorize Fulton Bros. to prosecute the appeal for the board, and hence that their act in giving the notice in its behalf was void, which the board could not cure by ratification. The objection, it is claimed, involves the power of this court to entertain the appeal through such notice. Having been signed by regularly admitted and practicing attorneys, it is *prima facie* sufficient. But there is more than a *prima facie* case here. They were directed by the president of the board to take the appeal. And this is as far as the court would usually prosecute the inquiry, and it would not seek for a confirmation of the president's authority: *Low v. Settle*, 22 W. Va. 387, 392. Under these conditions, the notice could not be said to be void. At most, it was voidable only, and would warrant the exercise of jurisdiction upon the appeal. The act of the attorneys, *prima facie*, was regular, because of the official character in which it was performed, coupled with and based upon the act of an officer of the board, having *prima facie* authority to confer the

power, and was susceptible of ratification by the board, which would have effect by relation, and confirm that which was already done: *Kinsley v. Norris*, 60 N. H. 131; *Am. Ins. Co. v. Oakley*, 38 Am. Dec. 561. The evidence to establish the attorneys' authority to prosecute the appeal is ample, and the notice is quite sufficient to give this court jurisdiction of the cause.

3. The remaining question is one involving a defect of parties, and cannot be raised for the first time upon appeal. The motion to dismiss will therefore be overruled, as will also the motion of the board of examiners to dismiss respondent's cross appeal.

MOTION OVERRULED.

[Decided 21 March, 1898.]

ON MOTION TO STRIKE AMENDED BILL OF EXCEPTIONS,
AND ON MOTION TO DISMISS CROSS APPEAL.

[52 Pac. 571.]

Mr. Geo. Clyde Fulton for both motions.

Mr. F. D. Winton, contra.

MR. JUSTICE WOLVERTON delivered the opinion.

4. Two motions are submitted at this time—one to strike out the amended bill of exceptions, and the other to dismiss the cross appeal—both of which were preferred by the Board of Medical Examiners. The motion to dismiss is based upon the fact that the notice of appeal was not served upon either the relators or the Board of Medical Examiners. The purpose of the proceeding is to revoke the license of a regularly admitted and practicing physician for unprofessional and dishonorable conduct,

and is *quasi* criminal in its nature. This being so, the state was properly made a party thereto, and, having been served with the notice of appeal, service thereof on the relators, or the board, is not necessary to the jurisdiction of the court. Substantially the same question was presented by a former motion, and decided as we now hold. In the opinion rendered at that time we inadvertently said that all the members of the board seemed to have signed the complaint, and were complainants in the proceeding. This was a mistake, as neither of the complainants was a member of the board, and resulted from a confusion of the names in the record. The misstatement of the fact, however, did not affect the result.

5. The judgment having been entered in the circuit court in the above cause on March 6, 1897, the bill of exceptions was settled, allowed, and signed on April 3, and the appeal perfected April 29. At a subsequent term, to wit, on December 24, 1897, upon motion of the defendant, the bill of exceptions was amended over the objection of the appellant. The amended bill of exceptions has been certified up, and it is this additional record that appellant seeks to have stricken out. The question presented is whether a bill of exceptions which has been settled, allowed, and signed by the trial judge can be amended at a subsequent term, and after an appeal has been taken and perfected. Such a paper, when filed with the clerk, becomes a part of the record in the cause: Hill's Ann. Laws, § 233. So that the amendment sought was of the record, which the court allowed by an order *nunc pro tunc*, and, after setting aside the former certificate, appended a new one to the amended bill of exceptions. The apparent object of the amendment was to make the record conform to the truth. The matters certified in the amended bill are in one or two particulars inconsistent with those contained in the original, and

are of such a nature as that they might become of vital importance at the hearing. The Board of Medical Examiners appeared by counsel when the application was presented, thus waiving any irregularities preliminary to the hearing, and the remaining question is solely one of power in the court below to make the amendment.

Some jurisdictions have adopted a rigid rule as respects amendments of this character, as in Mississippi, it is held that if the bill of exceptions is wrong when it is made part of the record in the cause, it must remain so, for no authority exists for its correction either in the supreme court or the court which settled and allowed it: *Bridges v. Kuykendall*, 58 Miss. 827. So in the Supreme Court of the United States, it is settled that after the term has expired without the court's control over the case having been reserved by some rule or special order, and especially after it has been entered in the supreme court, all authority of the court below to alter or amend a bill of exceptions formerly presented and allowed is at an end: *Michigan Ins. Bank v. Eldred*, 143 U. S. 293, 298 (12 Sup. Ct. 450).

But many authorities concur in holding to a much more liberal doctrine. By these it is established that a bill of exceptions, once settled and signed and properly filed, becomes a part of the record in the case to which it relates, and stands precisely upon the same footing as any other record. If it is settled and filed during the term, the presiding judge who signed it may, before the expiration thereof, make any changes or alterations which he may think necessary to make it conform to the facts, but thereafter he loses all power to alter or change it on his own motion, or upon mere suggestion. If, however, a bill of exceptions, through inadvertence or mistake, has been so made up as not to fairly and truly recite or represent what it purports to show as having actually trans-

pired during the course of the proceedings, it may, by order of the court entered *nunc pro tunc*, upon proper notice, be so amended at a subsequent term as that it will accord with the real facts: *Heinsen v. Lamb*, 117 Ill. 549 (7 N. E. 75); *Martin v. St. Louis, etc. Ry. Co.* 53 Ark. 250 (13 S. W. 765); *Churchill v. Hill*, 59 Ark. 54 (26 S. W. 378); *State v. Clark*, 67 Wis. 229 (30 N. W. 122); *Freel v. State*, 21 Ark. 221; *Goodrich v. City of Minonk*, 62 Ill. 121; *Newman v. Ravenscroft*, 67 Ill. 496; *Beckwith v. Talbot*, 2 Colo. 604; *Doane v. Glenn*, 1 Colo. 454; *Walker v. State*, 102 Ind. 502 (1 N. E. 856); *Morgan v. Hays*, 91 Ind. 132; *Harris v. Tomlinson*, 130 Ind. 426 (30 N. E. 214); *Lefferts v. State*, 49 N. J. Law, 26 (6 Atl. 521); *Warner v. Thomas Dying Works*, 105 Cal. 409 (38 Pac. 960, 37 Pac. 153); *McFarland v. West Side Improvement Co.*, 47 Neb. 661 (66 N. W. 637). And this may be done pending an appeal: *Seymour v. Thomas Harrow Co.*, 81 Ala. 250 (1 South. 45); *Lake Erie R. R. Co. v. Bates*, 19 Ind. App. 386 (46 N. E. 831); *Harris v. Tomlinson*, 130 Ind. 426; *Brooks v. Bruyn*, 40 Ill. 64. We incline strongly to the more liberal practice as being better suited to subserve the ends of justice, and are therefore constrained to adopt it. Both motions will be denied.

MOTIONS DENIED.

Decided 24 November, 1898.

ON THE MERITS.

[55 Pac. 25.]

For the Board of Examiners there was a brief over the names of *Cicero M. Idleman*, Attorney-General, *Harrison Allen* and *Fulton Bros.*, with an oral argument by *Messrs. Idleman* and *George Clyde Fulton*.

For Dr. Estes there was a brief over the name of *J. H. & A. M. Smith*, with an oral argument by *Mr. Albert Marshall Smith*.

MR. JUSTICE MOORE delivered the opinion.

This is a proceeding in the name of the state, upon the relation of private parties, before the State Board of Medical Examiners, to have the medical license of O. B. Estes revoked for dishonorable and unprofessional conduct, alleged to have been committed by unlawfully producing an abortion. The defendant having denied the material allegations of the complaint, a trial was had, resulting in a revocation of his license, from which action he appealed to the Circuit Court of Marion County, which changed the venue to Clatsop County, where the cause was tried, the action of the board reversed, and an order made that defendant be permitted to resume the practice of his profession, but the court denied his motion for costs and disbursements. From this judgment the state, the relators, and the defendant appeal.

It is contended by the relators' counsel that the trial court never obtained jurisdiction of the proceeding, and hence erred in refusing to dismiss the attempted appeal from the action of the board of examiners. The motion to dismiss said appeal was predicated upon the following grounds: (1) That no notice of appeal was ever served upon the secretary of the board of examiners; (2) that no appeal bond, as provided by law, was filed with or approved by said secretary; (3) the transcript was insufficient in form, and not filed within the time prescribed by law; (4) that the notice of appeal did not set forth the grounds of error nor describe the action of the board complained of; and (5) that the pretended appeal

was taken to the Circuit Court of Marion County, when it should have been to the Circuit Court of Multnomah County.

6. The notice of appeal in question has a certificate indorsed thereon acknowledging due service thereof, and purporting to have been subscribed by "Byron E. Miller, Secretary of Board of Medical Examiners." It is argued that a written acknowledgment of the service of a notice of appeal by a party is insufficient to authorize the court to assume jurisdiction without proof of the authenticity of the signature. The objection insisted upon is technical, and he who would take advantage of a technicality must be governed by the rule which he invokes: *Bilyeu v. Smith*, 18 Or. 335 (22 Pac. 1073); *Hermann v. Hutcherson*, 33 Or. 239 (53 Pac. 489). This rule compels a party who excepts to an irregularity to specify definitely the particular point which he maintains constitutes a departure from the prescribed mode of procedure, that the trial court may have an opportunity to correct the irregularity by permitting the record to be amended, if possible: *Elliott*, App. Proc. § 532; 2 Enc. Pl. & Prac. 348; *Scholfield v. Pope*, 103 Ill. 138. It will be observed that the point relied upon in the trial court as a ground for dismissing the appeal is that the notice thereof was not served upon the secretary of the board of examiners, while the objection urged here is that there is no proof of the service of such notice,—a contention which tacitly admits that the notice was served, but denies that the proof thereof was sufficient; thus showing that a question of irregularity, not affecting the jurisdiction, is presented, which this court as an appellate tribunal cannot entertain, because it was not presented to or considered by the court below.

7. The statute requires a person desiring to take an appeal from the action of the board of examiners to cause

to be served upon the secretary of said board a written notice thereof, which shall contain a statement of the grounds of such appeal, and shall file in the office of such secretary an appeal bond to the State of Oregon, with good and sufficient surety, to be approved by said secretary, conditioned for the speedy prosecution of such appeal, and the payment of such costs as may be adjudged against him thereon: Laws, 1895, p. 61, § 6. The bond filed with the secretary complied with these requirements, but, because the liability of the sureties was limited to the sum of \$500, it is contended that the trial court never acquired jurisdiction of the appeal. It will be remembered that the ground of the motion in the trial court upon this question was that no appeal bond as provided by law was filed, etc. This assignment does not point out the error now complained of with the degree of particularity required in such cases, and, under the rule hereinbefore stated, is insufficient to call the attention of the trial court to the irregularity here relied upon.

8. When a person desiring to appeal from the decision of the board of examiners has caused to be served upon its secretary a notice of appeal, and filed in his office an appeal bond, it is made the duty of said secretary, within ten days after such service and approval of the bond, to transmit to the clerk of the circuit court to which the appeal is taken a certified copy of the pleadings, etc., together with the bond and notice of appeal: Laws, 1895, p. 61, § 6. This duty was duly performed within the time prescribed by law, except that the certificate authenticating the transcript failed to recite that the copies contained therein had been by him compared with the originals, etc., as required by Section 748, Hill's Ann. Laws; whereupon the court, by rule, re-

quired the secretary to send up an amended transcript, duly certified, which was done, but not until after the expiration of ten days from the service of the notice of appeal. It is now argued by counsel for the relators that it was the duty of the defendant to obtain and file a perfect transcript, and that because the original certificate was defective, thereby necessitating an amended transcript, which was not filed within the time prescribed by law, the court never obtained jurisdiction of the appeal. When an appeal from the judgment or decree of the circuit court has been perfected, the appellant within a given time must file with the clerk of this court a transcript of the final record: Hill's Ann. Laws, § 541. In such case it has been held that, where the statute expressly requires the appellant to file the transcript in the appellate court, the clerk of the trial court, in its preparation, acts as his agent, and that the clerk's failure to comply with the requirements of the law in this respect is attributable to the laches of the appellant: 2 Enc. Pl. & Prac. 280, and cases cited in note 2. Where, however, the statute imposes upon the clerk of the trial court the duty of filing the transcript on appeal, such requirement does not relieve the appellant from the necessity of showing that the failure of the clerk to file the transcript within the time prescribed by law was not imputable to him: *Crawford v. Haller*, 2 Wash T. 161 (2 Pac. 353); *Callahan v. Houghton*, 2 Wash St. 539 (27 Pac. 125). The secretary of the board having complied with the statute as far as the filing of the transcript was concerned, relieved the defendant from all duty in that respect, and he is not responsible for the appended certificate, which, if informal or imperfect, the court could, as in cases on appeal from justices' courts, have corrected by proper amendment.

9. The notice of appeal assigns the errors which the

defendant claimed the board of examiners committed, and, the judgment complained of being described therein with reasonable certainty, the statutory requirement that the notice shall contain a statement of the grounds of such appeal is sufficiently complied with. The statute provides that an appeal from the action of the board of examiners revoking a medical license shall be to the circuit court in and for the county in which the hearing was had upon which such license was revoked: Section 6, *supra*. The transcript was filed in the office of the Clerk of the Circuit Court for Marion County, but it is claimed that the record is silent as to where the hearing was had, and, this being so, it must be presumed that the board met in Multnomah County, where the regular meetings thereof are required to be held (Laws, 1895, p. 61, § 2), and hence the appeal was not taken to the proper court. The motion in the trial court to dismiss the appeal recites that such hearing was had before the said board in Marion County, and the verdict and decision of the board purports to have been signed at Salem, in said county, in view of which the point contended for is without merit.

Counsel for the relators, in their brief, contend that the circuit court erred in refusing to dismiss the appeal for other reasons, which will not be considered, because the grounds thereof were not assigned in their motion in the court below.

10. Considering the case upon its merits, it appears that the woman upon whom the operation is said to have been performed, appeared as a witness before the board of examiners at defendant's trial, and testified that he perpetrated the overt act with the commission of which he was charged, but at his trial in the circuit court, as a witness for the state, she denied that any abortion had been produced upon her, or that the defendant had per-

formed any dishonorable or unprofessional operation upon her ; whereupon the court permitted counsel for the state to cross-examine her at great length, but the testimony brought out thereby is substantially the same as that given in her direct examination, in which she testified that, by reason of her illness, she was not responsible for what she said when appearing before the board of examiners, and that, being unable to read the English language, she did not understand the purport of an affidavit subscribed by her which charged defendant with the commission of said dishonorable and unprofessional conduct. Counsel for relators thereupon called another witness, by whom they sought to prove that an abortion had been produced upon the last witness by showing her physical condition at the time it was alleged that she had been delivered of a foetus, but the court, upon defendant's objection to the introduction of such testimony, refused to permit the witness to answer the question propounded unless counsel could give some assurance that he would thereafter introduce testimony tending to connect the defendant with the commission of the offense, to which he replied : "I don't know whether I can do that or not. I don't like to engage to do a thing, and then not live up to the standard. I should like to try it. I want to be perfectly honest and fair with the court. I don't know whether I can or not. I tell you frankly and honestly that I doubt it." The court thereupon refused to permit the witness to answer the question, and, no further testimony being offered, the jury was instructed to return a verdict in favor of the defendant, to which counsel for the relators excepted. The testimony sought to be introduced by the relators tended to contradict their chief witness, but it was incompetent to prove that defendant was guilty because such witness had been delivered of a foetus, and, as counsel frankly admitted that he doubted

his ability to connect defendant with the offense, the court committed no error in rejecting the testimony: *Dunn v. People*, 29 N. Y. 523 (86 Am. Dec. 319); *McCarney v. People*, 83 N. Y. 408 (38 Am. Rep. 456).

11. It is contended by counsel for defendant that the court erred in refusing to allow their client his costs and disbursements incurred in his defense. The expenses incident to the trial of an action not being recoverable at common law, the right to recover them must be found in the statute: 5 Enc. Pl. & Prac. 108; *Wood v. Fitzgerald*, 3 Or. 568; *Mitchell v. Downing*, 23 Or. 448 (32 Pac. 394).

12. The legislative assembly, in creating the board of examiners, undoubtedly considered that the physician whose license had been revoked would be powerless to review the act of the board except for an erroneous exercise of judicial functions, or where it had exceeded its jurisdiction (Hill's Ann. Laws, § 585), in view of which the right of appeal in such cases was conferred; but, such appeal not being from the judgment of a court, the general statute providing for the recovery of costs and disbursements can have no application, and defendant must rely upon the statute giving the appeal for his relief. The provision on the subject of costs reads as follows: "In case the final decision of the supreme court be against said medical examining board, then and in that case said court shall make such order in the premises as may be necessary, and said board shall act accordingly; *provided*, that in no case shall an appeal bond be required of said board, nor shall any costs be adjudged or taxed against the same:" Laws, 1895, p. 61, § 6. The act in question having made no provision for the recovery of costs in case the action of the board be reversed, defendant is not entitled to recover from the

relators as in an ordinary action : Hill's Ann. Laws, §§ 564, 565.

13. The statute provides that if the action of the board be reversed by the circuit court, and no appeal taken from such judgment to this court within sixty days, the board of examiners shall immediately upon the expiration thereof reinstate upon the records of said board the name of the person whose license was revoked; but, in case the board shall appeal from such judgment, no reinstatement shall be required until the final determination of said cause upon appeal : Laws, 1895, p. 61, § 6. The trial court in reversing the action of the board adjudged that the defendant should be permitted to practice medicine and surgery in this state as if the verdict and decision of such board had not been rendered. It is contended that such an order of the circuit court was premature, and that its judgment in this respect is erroneous. An appeal is not like a writ of error in civil cases at common law, which was a matter of right, but exists only in such cases as the legislative assembly may prescribe, and, having provided a particular method for reviewing the action of the board, such method is exclusive : 2 Enc. Pl. & Prac. 16 ; *Savage v. Gulliver*, 4 Mass. 171. The judgment of the circuit court in this respect is erroneous, in view of which it is reversed so far as it relates to the immediate reinstatement of defendant to the privilege of which he had been denied by the board, but in all other respects affirmed. The cause will be remanded, with directions to the court below to order the said board of examiners to reinstate forthwith upon the record of said board the name of O. B. Estes as a practicing physician and surgeon, and for such further proceedings as may be necessary, not inconsistent with this opinion.

MODIFIED.

Decided 5 December; rehearing denied 19 December, 1898.

BLACKBURN v. SOUTHERN PACIFIC COMPANY.

[55 Pac. 225.]

84	215
440	10
40	78
84	215
48	15

1. **ACCIDENT AT CROSSING—NEGLIGENCE A COMPLETE DEFENSE.**—There can be no recovery for the death of one who was struck by a railway train at a grade crossing, where the evidence showed that, though such train was moving at a rate of speed prohibited by law, the proximate cause of the accident was the negligence of the deceased in approaching such crossing without exercising due caution.
2. **DUTY TO STOP AND LISTEN FOR TRAIN.**—The failure of a person about to cross a railway track, on a highway at grade, to look and listen for an approaching train, or to stop for such purpose, where the view of the track is obstructed, or where there is noise which he may control, and which may prevent his hearing such train, is negligence *per se*, which will bar a recovery for an injury resulting from a collision with a train at such crossing: *Durbin v. Oregon Ry. & Nav. Co.*, 17 Or. 5, and *McBride v. Northern Pac. R. R. Co.*, 19 Or. 64, approved and followed.
3. **DUTY OF COURT TO DIRECT A VERDICT.**—In an action for injuries received by a traveler on the highway, at a railway crossing, it is the duty of the court to direct a verdict for defendant, where the uncontradicted evidence shows the omission of a duty which the law requires of such traveler: *Durbin v. Oregon Ry. & Nav. Co.*, 17 Or. 5, approved and followed.

From Clackamas : THOS. A. McBRIDE, Judge.

Action by Sarah A. Blackburn against the Southern Pacific Company. There was a verdict and judgment in favor of plaintiff, and defendant appeals.

REVERSED.

For appellant there was a brief over the name of *Bronaugh, McArthur, Fenton & Bronaugh*, with an oral argument by *Mr. William D. Fenton*.

For respondent there was a brief over the names of *C. D. & D. C. Latourette*, and *W. H. Dobyns*, with an oral argument by *Messrs. Dobyns and C. D. Latourette*.

MR. JUSTICE BEAN delivered the opinion.

This is an action to recover damages for the death of plaintiff's intestate, caused by a collision of the vehicle in which he was riding with one of defendant's trains at a street crossing in Oregon City. The ground of negligence charged in the complaint is that at the time of the collision the train was moving at a greater rate of speed than eight miles an hour, in violation of an ordinance of the city, and without ringing a bell, as required by such ordinance; and the defense is contributory negligence. Upon the issue joined, a trial was had, resulting in a verdict and judgment in favor of plaintiff for the sum of \$2,000, and defendant appeals.

1. In answer to special interrogatories, the jury found that the speed of the train was from ten to twelve miles an hour, but that just before the accident the bell was being rung. The defendant's negligence in running its train at an unlawful rate of speed must therefore be regarded as an established fact, and the controlling question in the case is whether the court erred in overruling defendant's motion for a nonsuit, on the ground that the evidence showed that the proximate cause of the accident was the negligence of the deceased in approaching the crossing without exercising due caution; for, if such was the fact, the plaintiff cannot recover, notwithstanding the negligence of the defendant: *Schofield v. Chicago, etc. Ry. Co.*, 114 U. S. 615 (5 Sup. Ct. 1125); *Railroad Co. v. Houston*, 95 U. S. 697; *Chicago, etc. Ry. Co. v. Crisman*, 19 Colo. 30 (34 Pac. 286); *Hager v. Southern Pac. Co.*, 98 Cal. 309 (33 Pac. 119); *Gothard v. Alabama R. R. Co.*, 67 Ala. 114.

The defendant's track runs north and south through Oregon City, crossing Tenth Street at a slight deviation from a right angle one hundred and fifty feet east of the intersection of such street with Main Street. From Main Street, along Tenth to the railway track, the view

of an approaching train from either direction is completely obstructed by buildings, except that on the north side, at a point fifty-seven feet from the track, a train can be seen through an opening two feet wide when one hundred and thirty-seven feet from the crossing; and there is also a space of about fifteen feet on the same side, between the track and the nearest building, through which the defendant claims a view of the track can be had, looking north, of from ninety to one hundred and fifty-seven feet, accordingly as one approaches it, but the plaintiff contends that the view through this space is obstructed by brush and trees. About 11 o'clock on the morning of July 18, 1895, the deceased and his son, a lad sixteen or seventeen years of age, who were returning home from Oregon City, came down Main Street in an ordinary two-seated farm wagon, drawn by two horses, turned into Tenth, and, without stopping to look or listen for an approaching train, attempted to cross the track, when the wagon was struck by a train coming from the north, and the plaintiff's intestate killed. The evidence for the plaintiff tended to show that, at the time the deceased and his son turned into Tenth Street, the horses were traveling in a trot, but soon thereafter, the deceased having cautioned his son, who was driving, to look out for the cars, the latter checked them up to a walk when about halfway between Main Street and the crossing, and they continued in that gait until the accident; that, as they passed along the street, both the deceased and his son looked through the opening on the north, between the buildings referred to, and listened for an approaching train, but did not see or hear it until it struck the near horse; that they were both familiar with the crossing, and saw the sign there, "Look out for the cars!" and were expecting a train about that time;

but it is in proof, and it is admitted, that they did not stop their team to look or listen after turning into Tenth Street.

Upon these facts, the question is presented whether the deceased, in approaching the crossing, acted with that ordinary care and circumspection which the law requires of a traveler on the highway who is about to cross a railroad track. In ordinary actions, grounded upon negligence, and in which contributory negligence is available as a defense, the general rule is that the plaintiff's conduct is to be measured by that of an ordinarily prudent and cautious person under the same circumstances, and the question is one of fact for the jury. But, in view of the importance of railway traffic, the character and momentum of trains, and their confinement to a single track, the danger from a collision at a crossing, not only to the traveler on the highway, but to the passengers on board the train, is such that the courts have been compelled to proceed beyond the rule which ordinarily prevails, and prescribe, as a matter of law, the *quantum* of care required of a traveler about to cross a railway track. "The requirements of the law, moreover," says Mr. Beach, "proceed beyond the featureless generality that one must do his duty in this respect, or must exercise ordinary care under the circumstances. The law defines precisely what the term 'ordinary care under the circumstances' shall mean in these cases. In the progress of the law in this behalf, the question of care at railway crossings as affecting the traveler is no longer, as a rule, a question for the jury. The *quantum* of care is exactly prescribed as matter of law. In attempting to cross, the traveler must listen for signals, notice signs put up as warnings, and look attentively up and down the track. A multitude of decisions of all the courts enforce this reasonable rule. It is also so consonant with right reason and the dictates

of ordinary prudence, and so much in line with the ordinary care which the average of mankind display in the daily routine of life, that it should seem to be scarcely dependent upon the authority of decided cases in the law courts. The traveler on the highway must even come to a halt for this purpose ; but he is not required to get out of his wagon, and go forward on foot, for the purpose of looking, especially when such a course would not have prevented the collision, but would rather have exposed the traveler to the very peril it was designed to avoid :” Beach, *Contrib. Neg.* (2 ed.), §§ 180, 181.

2. In harmony with this rule, it is a principle of law, firmly established in this state as elsewhere, that the failure of a person about to cross a railway track on a highway, at grade, to look and listen for an approaching train is negligence *per se*, and will bar a recovery for an injury received by a collision with a train at the crossing : ‘ *Durbin v. Oregon Ry. & Nav. Co.*, 17 Or. 5 (11 Am. St. Rep. 778, 17 Pac. 5); *McBride v. Northern Pac. R. R. Co.*, 19 Or. 64 (23 Pac. 814).

In Pennsylvania and many other states the rule is pressed further, and it is the imperative duty of the party in all cases, not only to look and listen, but to stop for that purpose at a convenient distance from the track before attempting to go upon it ; and, if he suffers injury from a collision with the train, his conduct in failing to stop is negligence *per se*, and must be so declared by the court : Bailey, *Confl. Jud. Dec.*, p. 263 ; *Pennsylvania R. R. Co. v. Beale*, 73 Pa. St. 504 (13 Am. Rep. 753) ; *Ehrisman v. East Harrisburg Ry. Co.*, 150 Pa. St. 180 (17 L. R. A. 448, 24 Atl. 596) ; *Aiken v. Pennsylvania R. R. Co.*, 130 Pa. St. 380 (18 Atl. 619, 17 Am. St. Rep. 775). “There never was a more important principle settled,” says Mr. Justice SHARSWOOD, in *Pennsylvania R. R. Co. v. Beale*, 73 Pa. St. 504 (13 Am. Rep. 753), “than that the

fact of the failure to stop immediately before crossing a railroad track, is not merely evidence of negligence for the jury, but negligence *per se*, and a question for the court. It was important, not so much to railroad companies, as to the traveling public. Collisions of this character have often resulted in the loss of hundreds of valuable lives of passengers on trains; and they will do so again, if travelers crossing railroads are not taught their simple duty, not to themselves only, but to others. The error of submitting the question to the jury whether, if the deceased had stopped, he could have seen or heard the approaching train, runs through the entire charge and answers of the learned judge below. He should, upon the uncontradicted evidence, have directed a verdict for the defendants." This rule is simple, affords an unvarying standard by which the *quantum* of care required of the traveler can be determined, and, if observed, accidents at crossings would unquestionably rarely occur. But, while there is much force in the argument of Mr. Justice SHARSWOOD in the case referred to, that "the fact of collision shows the necessity there was of stopping" even in cases where the view of the track is unobstructed, it is probable the doctrine having the most support in the decided cases is that it cannot be affirmed as a matter of law, in all cases, that there is a duty on the traveler to stop before attempting to cross: 7 Am. & Eng. Enc. Law (2 ed.), 430. If the view is unobstructed, so that he can see an approaching train before it reaches the crossing, he has no occasion to listen, and hence it is said there is no reason why he should stop for that purpose; but if the view is obstructed, so that he cannot use the sense of sight, it then becomes his duty to listen, and to listen carefully and attentively; and if there is any noise or confusion over which he has control, either from the vehicle in which he is traveling, or

otherwise, which may interfere with the sense of hearing, the authorities are quite agreed that it is his duty, as a matter of law, to stop such noise, and listen for a train, before going upon the track, because he cannot listen carefully without doing so.

Judge Elliott, in his recent work on Railroads, says that "ordinary care often requires that the traveler should stop, look, and listen for moving trains, from a place where danger can be discerned and precaution taken to avert it. If, for instance, the noise is so great that an approaching train cannot be heard, or the obstructions such that it cannot be seen, then the traveler must come to a halt, and look, and listen. It cannot be said that one who simply looks and listens where such acts are fruitless and unavailing exercises that degree of care which the law requires. While it cannot be justly affirmed, as we believe, as a matter of law, that there is a duty to stop in all cases, yet there are cases where the failure to stop must be deemed such a breach of duty as will defeat a recovery by the plaintiff. There are very many cases holding that the surroundings may be such as to impose upon the traveler the duty of stopping, looking, and listening, and these cases, as we think, assert the true doctrine. Some of the courts, in well-reasoned cases, press the rule further, and hold that the traveler must, in all cases, stop, look, and listen. As we have said, we do not think that it can justly be affirmed, as matter of law, that there is a duty to stop in all cases; but we do think that the duty exists in cases where there is an obstruction to sight or hearing, and that where the surroundings are such that but one conclusion can be reasonably drawn, and that conclusion is that it is negligence to proceed without halting, the court should without hesitation direct a verdict if no halt is made." Section 1167. "The rule is now firmly established in

this state, as it is elsewhere," says Mr. Chief Justice ALVEY, in *Philadelphia Railroad Co. v. Hogeland*, 66 Md. 149, 161 (7 Atl. 107, 59 Am. Rep. 159), "that it is negligence *per se* for any person to attempt to cross tracks of a railroad without first looking and listening for approaching trains; and, if the track in both directions is not fully in view in the immediate approach to the point of intersection of the roads, due care would require that the party wishing to cross the railroad track should stop, look, and listen, before attempting to cross. Especially is this required where a party is approaching such crossing in a vehicle, the noise from which may prevent the approach of a train being heard. And if a party neglects these necessary precautions, and receives injury by collision with a passing train which might have been seen if he had looked, or heard if he had listened, he will be presumed to have contributed by his own negligence to the occurrence of the accident; and, unless such presumption be repelled, he will not be entitled to recover for any injury he may have sustained. This is the established rule, and it is one that the courts ought not to relax, as its enforcement is necessary as well for the safety of those who travel in railroad trains as those who travel on the common highways."

And in *Chase v. Maine Cent. R. R.*, 167 Mass. 383 (45 N. E. 911), it is said to be a general, although not a universal, rule, "that, if there is anything to obstruct the view of a traveler on the highway at a crossing at grade, it is his duty to stop until he can ascertain whether he can cross with safety." To the same effect, see *Patterson, Ry. Acc. Law*, § 177; *Field, Dam.* § 175; *East Tenn. Ry. Co. v. Kornegay*, 92 Ala. 228 (9 South. 557); *Gothard v. Ala. etc. R. R. Co.*, 67 Ala. 114; *Chicago, etc. Ry. Co. v. Crisman*, 19 Colo. 30 (34 Pac. 286); *Cin. Ry. Co. v. Duncan*, 143 Ind. 524 (42 N. E. 37); *Cin. Ry. Co. v. How-*

ard, 124 Ind. 280 (8 L. R. A. 593, 19 Am. St. Rep. 96, 24 N. E. 892); *Jensen v. Mich. Cent. R. R. Co.*, 102 Mich. 176 (60 N. W. 57); *Lake Shore R. R. Co. v. Miller*, 25 Mich. 274; *Haas v. Grand Rapids R. R. Co.*, 47 Mich. 401 (11 N. W. 216); *Banning v. Chicago, etc. Ry. Co.*, 89 Iowa, 74 (56 N. W. 277); *Louisville, etc. Ry. Co. v. Stommel*, 126 Ind. 35 (25 N. E. 863); *Littaur v. Narragansett R. R. Co.*, 61 Fed. 591; *Merkle v. New York, etc. R. R. Co.*, 49 N. J. Law, 473 (9 Atl. 680); *Seefeld v. Chicago, etc. R. R. Co.*, 70 Wis. 216 (5 Am. St. Rep. 168, 35 N. W. 278); *Stepp v. Chicago, etc. Ry. Co.*, 85 Mo. 229; *Central R. R. Co. v. Smalley*, (N. J. Law) 39 Atl. 695; *Chase v. Maine Cent. R. R. Co.*, 78 Me. 346 (5 Atl. 771); *Flemming v. Western, etc. R. R. Co.*, 49 Cal. 253; *Shufelt v. Flint, etc. R. R. Co.*, 96 Mich. 327 (55 N. W. 1013); *Houghton v. Chicago, etc. Ry. Co.*, 99 Mich. 308 (58 N. W. 314); *Henze v. St. Louis, etc. Ry. Co.*, 71 Mo. 636; *Beyel v. Newport, etc. R. R. Co.*, 34 W. Va. 538 (12 S. E. 532, 45 Am. & Eng. Ry. Cas. 188).

In *Central R. R. Co. v. Smalley*, (N. J. L.) 39 Atl. 695, the plaintiff drove, by daylight, slowly along a highway, towards a railroad crossing, looking and listening for approaching trains. His view of trains that might come from the west was cut off, notwithstanding which he drove, without stopping, upon the track; and his horse was killed, his sleigh demolished, and himself injured by the engine of a train which, until it was upon him, he could not see, by reason of the obstruction, and did not hear. It was held that it was error in the trial judge to deny the motion for a nonsuit for contributory negligence. So, also, in *Chase v. Maine Central R. R. Co.*, 78 Me. 346 (5 Atl. 771), the evidence showed that the crossing, where the deceased was injured was at the north end of a cut, and, between the cut and the highway upon which he was traveling, high land and other obstacles

intervened which obstructed his view of the train coming from the south, for a considerable distance before reaching the crossing. This, the court said, made it his duty to listen, and to listen carefully and attentively. To do this, if riding in a sleigh, and especially in a sleigh with bells attached, it would be necessary to stop his horse; for, surely, he could not listen carefully and effectually without stopping his horse, and thus stilling the noise of his own team. And, because the conduct of the deceased did not come up to this standard, it was held that he was guilty of contributory negligence such as would bar a recovery. In *Flemming v. Western, etc. R. R. Co.*, 49 Cal. 253, the plaintiff was driving a four-horse team towards a railroad crossing. The air was so filled with dust that he could not see the railroad, and his wagon made some noise. He attempted to cross the track without stopping to listen for an approaching train, and his horses were killed by the engine. It was held that he was guilty of contributory negligence, and could not recover, the court saying: "As the plaintiff could not have used his eyes with effect, it was incumbent on him, as a person of ordinary prudence, to make the best use of his ears, which he could not do while his team was in motion. Upon the plaintiff's statement of the facts, we hold that he was guilty of contributory negligence in failing to stop his team to listen for an approaching train." In *Shufelt v. Flint, etc. Ry. Co.*, 96 Mich. 327 (55 N. W. 1013), the plaintiff's wife approached a railroad crossing upon a highway, in a lumber wagon drawn by two horses. A bank and woodpile obstructed the view of the track as she approached, until she reached a point eighteen feet from the crossing. She was driving in a slow walk, but did not stop to look or listen for an approaching train. When the horses' feet were between the rails, she saw the train, and tried to turn

them off the track, but was struck by the engine, and injured. It was held that she was guilty of such contributory negligence as would prevent a recovery, the court saying that trains must run where the view is obstructed by cuts, embankments, trees and other things, and he who does not choose to stop and listen when he cannot see must suffer the consequences of his own negligence.

Again, in *Houghton v. Chicago, etc. Ry. Co.* 99 Mich. 308 (58 N. W. 314), the plaintiff, who was returning home from his market town, riding on two boards laid upon his wagon, accompanied by his boy, approached a crossing on defendant's road at a point where his view of the track was obstructed for one hundred and ninety-six feet from the crossing, knowing that a fast train was due about that time. He watched for the train, and listened, as did also the boy, but did not stop his team for that purpose at any point. The ground was frozen, and the wagon made some noise. As his horses stepped upon the track, he noticed the light upon them, and whipped them up, but was struck and severely injured before he got across; and it was held that his attempt to cross the track without stopping to listen for an approaching train was contributory negligence, preventing a recovery, notwithstanding the fact that other teams had immediately preceded him across the track in safety. And so, also, in *Henze v. St. Louis, etc. Ry. Co.*, 71 Mo. 636, the testimony of plaintiff's witnesses showed that the deceased, with his infant son, was driving in a two-horse wagon, at a slow walk, along a highway where it crossed the railroad, when they were run over and killed by a train, which was an extra, and not running on time. The witnesses were not agreed as to whether the deceased could have seen the train as he approached the crossing;

but the testimony showed that, while no bell was rung or whistle sounded, the train made plenty of noise, and he could have heard it if he had stopped and listened; that he did not stop to look or listen, or take any other precaution to avoid the danger; and it was held that a demurrer to the evidence was well taken, and should have been sustained, the court saying that, "if Henze had used the precaution which common prudence dictates, it is not likely that the calamity would have occurred. If he had stopped to look and listen when near the track, and could neither see nor hear the approaching train, on account of the cut or other obstructions, and no signal was given from the train, he would have been justifiable in attempting to cross, and no negligence would have been imputable to him. But he had no right to drive along over a dry, hard road in a two-horse wagon, the noise of which might prevent him from hearing an approaching train, and, without stopping an instant to see or hear, go upon the railroad track, except at his own peril."

Now, applying the doctrine of the authorities to the case at bar, the conclusion is irresistible that the deceased did not exercise such care and prudence as the law requires in approaching the track to ascertain whether he could cross in safety. He was familiar with the crossing, and knew that it was a blind and dangerous one. His view of an approaching train from the south was completely obstructed, and on the north substantially so. It is obvious, from the entire surroundings, that he could not safely depend upon his eyes to ascertain whether a train was approaching from either direction. It was, therefore, incumbent upon him to listen, and listen attentively, and as the noise of his wagon passing over a hard, dry, and more or less rocky street, would interfere with the sense of hearing, ordinary care required that he stop the

noise by stopping the wagon when he was near enough to the track to determine by listening whether there was danger or not. It is true the evidence indicates that his team was brought to a walk ; but, notwithstanding this, the noise from the wagon and horses' feet was necessarily sufficient to seriously interfere with the effective use of the sense of hearing. If they had been brought to a full stop, there would have been no disturbing sound which the plaintiff could control ; and, under the circumstances, we think he was bound to exhaust this source of information. The whistle on the train was sounded at the whistling station north of the crossing, and the bell was rung just prior to the accident. The train was proceeding at the rate of ten or twelve miles per hour, and he was driving at the rate of three or four. They met at the crossing. It seems clear, therefore, that they were so near to each other at any time while the deceased was within one hundred feet of the crossing that, if he had stopped his wagon and listened, he would have heard the approaching train. Having neglected this method of informing himself, he failed, in our opinion, to use due diligence under the circumstances, and the motion for a nonsuit should have been allowed.

3. It is unquestioned that negligence is generally a question of fact for the jury ; but in actions for injuries at railway crossings, where, as in this case, the uncontradicted evidence shows the omission of a duty which the law requires of the traveler, it is the duty of the court to direct a verdict for the defendant : *Durbin v. Or. Ry. & Nav. Co.*, 17 Or. 5 (11 Am. St. Rep. 778, 17 Pac. 5) ; *Elliott, Railroads*, § 1179. The judgment will, therefore, be reversed, and it is so ordered.

REVERSED.

Argued 30 November; decided 19 December, 1898.

CLEVELAND OIL CO. v. NORWICH INS. SOCIETY.

[55 Pac. 435.]

1. **CONDITIONS OF AN ORAL CONTRACT OF INSURANCE.***—To render binding a contract of insurance, or to insure, there must be a subject-matter to which the policy is to attach, and a risk to be insured against; the amount of the indemnity and the duration of the risk must be definitely fixed, and the premium or consideration must be agreed upon or paid, or exist as a valid legal charge against the insured.
2. **PRESUMPTION AS TO EFFECT OF ERROR.**—Where error appears in the record, there is no presumption that it was rendered harmless by any subsequent evidence or proceeding. If such was the case the matter showing it should have been included in the bill of exceptions: *Du Bois v. Perkins*, 21 Or. 189, followed.
3. **EVIDENCE OF CUSTOM—ORAL INSURANCE CONTRACT.**—In support of an oral contract of insurance it is competent to prove a custom of insurance companies with reference to the time the risk attaches in such cases.
4. **ORAL INSURANCE—PRESUMED RATE.**—An agreement to issue, without specifying the premium, is a contract at the usual rate in such cases.
5. **ORAL INSURANCE—PRESUMED POLICY—BURDEN OF PROOF.**—It will be presumed in support of an oral contract of insurance which was actually made that the minds of the parties met upon an agreement containing the terms and conditions of a policy such as is usually issued by the contracting company covering like risks; but the insured must show those terms and conditions.
6. **SUFFICIENCY OF EVIDENCE.**—A stipulation entered into on the trial of an action for damages for the breach of an oral contract to insure, which recites that it was admitted that a specified premium was tendered after the loss, and that it was the usual charge by insurance companies for a \$1,000 policy, such as described in the complaint, but where no policy was described in the complaint, is insufficient to show the duration of the risk, so as to warrant a recovery.
7. **PRACTICE IN SUPREME COURT—PRESUMPTION OF CORRECTNESS.**—When the transcript shows that the record below included a paper which may have contained recitals that would sustain the judgment, and which the trial court must have considered in reaching a decision, the appellate court will presume that the judgment appealed from was correct in the absence of such paper: *Fisher v. Kelly*, 26 Or. 240, cited.
8. **CONCLUSIVENESS OF CERTIFICATE TO BILL OF EXCEPTIONS.**—The presumption on appeal that a stipulation not incorporated in a bill of exceptions which may have included recitals which would sustain the judgment did include them yields to the judge's certificate appended to the bill of exceptions, stating that it constitutes all the testimony introduced or received upon the trial, and upon which the respondent relies to sustain the verdict, and that there is no other testimony in the case which can be claimed as tending to sanction said verdict, as the word testimony is broad enough to include evidence.

*NOTE.—On the subject of oral insurance contracts, see *Long v. North British Ins. Co.*, 21 Am. St. Rep. 883; *Newark Mach. Co. v. Kenton Ins. Co.*, 22 L. R. A. 708; *Croft v. Hanover Ins. Co.*, 52 Am. St. Rep. 802.—REPORTER.

34	228
88	186
84	228
139	279

From Multnomah : HENRY E. MCGINN, Judge.

Action by the Cleveland Oil & Paint Manufacturing Company against the Norwich Union Fire Insurance Society to recover on an oral contract of insurance, and defendant appeals from a judgment against it.

REVERSED.

For appellant there was a brief over the name of *Paxton, Beach & Simon*, with an oral argument by *Mr. Nathan D. Simon*.

For respondent there was a brief over the names of *Daniel J. Malarkey*, and *Starr, Thomas & Chamberlain*, with an oral argument by *Mr. Malarkey*.

MR. JUSTICE MOORE delivered the opinion of the court.

This is an action to recover a fire loss on an alleged oral contract of insurance. The substance of the complaint is that on May 24, 1895, plaintiff was the owner of a stock of paints, oils, varnishes, etc., located in a frame building erected on leased land in Portland, Oregon, and, being desirous of securing indemnity against loss by fire, promised defendant that if it would insure said property for one year from that day, at 12 o'clock noon, plaintiff would pay upon demand the usual and customary rate therefor; that defendant accepted the offer, and insured the property upon the terms specified, and agreed that a policy evidencing the contract should be forthwith issued; that on June 2, 1895, said property was damaged by fire to the extent of \$9,206.82; that prior to the commencement of the action plaintiff tendered to defendant the sum of \$32.50, the premium agreed upon, and demanded the delivery of the policy; but defendant refused to accept the offer or to comply

with the demand, by reason whereof plaintiff has sustained damage in the sum of \$1,000. The answer having denied the material allegations of the complaint, a trial was had, resulting in a judgment for plaintiff in the sum of \$958.15, and defendant appeals.

It is contended by defendant's counsel that the court erred in admitting certain testimony over their objection, and in refusing to grant a judgment of nonsuit. A stipulation entered into between counsel for the parties was introduced and read in evidence, but is not incorporated in the bill of exceptions. Its contents, however, may be inferred from the following statement made by the court: "Gentlemen of the jury: In this case it has been stipulated by the parties that prior to the commencement of this action the plaintiff in this case tendered to Clemens & McFarland, who were the agents of the Norwich Union Fire Insurance Society—the local agents here at Portland, Oregon—to issue a policy of insurance, the sum of \$32.50; that this was tendered within thirty days after the property was destroyed by fire. This is the amount of the premium which would, they say, have been due upon the policy of insurance of \$1,000. Therefore there will be no evidence admitted differently. It is also agreed that that premium was tendered to them, and it was not accepted. It is also agreed that Clemens & McFarland were the local agents at Portland, Oregon, of this Norwich Union Insurance Society, and that they were empowered to issue a policy of this kind." Mr. Sears, Counsel for Defendant: "That was a little broader, if your honor please, than the statement, I think, of the stipulation. It is admitted that that was tendered, and that that was the usual and customary charge by insurance companies for a policy of \$1,000 described in the complaint, and that Clemens & McFarland were the local agents; but it is not stipulated that

they had authority to make insurance of this kind." The Court: "It is not so stipulated?" Mr. Starr, Counsel for Plaintiff: "Yes, sir." Mr. Sears: "This is the language [reading]: 'That said Clemens & McFarland were the local agents of the defendant at Portland, Oregon, authorized to insure property for and on behalf of the defendant.' There is nothing said as to whether they had authority to make insurance of this kind." Mr. Starr: "I don't care anything about that." The Court: "So that upon these points, gentlemen of the jury, there will be no proof received contrary to the facts that are stipulated and agreed by the parties."

W. L. Lindhard, being called as a witness, testified, in substance, that he, as plaintiff's manager, operated its store on Front and First and a factory on Fourteenth and Kearney streets, in the City of Portland; that on May 24, 1895, plaintiff was the owner of a stock of paints, oils, etc., located within said factory; and that on said day he entered into an agreement for insurance with defendant; whereupon the following questions and answers were asked and given: "Q. You may state all the conversation that took place at that agreement, where it was, and who was present. A. There was no one present at the time the agreement was made. So I came out of the store, and walked about half a block down to the corner of First and Stark streets, when Mr. McFarland met me, and he halted me, saying, 'I was just going up to your office, to find out if I could renew the policy falling due soon on your store.' I asked him what company he represented. He said, 'The Norwich Union,' and I then said, 'I thought that was Henry Dosch's company.' He said, 'It belongs to me now; it is mine now.' I said, 'You may write that policy, provided you take a similar amount on the stock of the factory. Q. [Cross.] The twenty-fourth of May you are talking about? A. I

could not say as to the dates. Q. On or about that time? A. I looked it up after the fire, and we ascertained that that was about the date. And he said, 'What do you want me to write on?' and I told him the stock; that we had sufficient insurance on both the building and machinery; and I at the same time told him that he would not have insurance on the stock of the store, as we were having some at the factory it was hard to place.

Q. Why did you tell him that? A. In justice to the other insurance companies, whom we also made conform to the same insurance rules. He said: 'All right; I will do so. I will cover it.' I was then off, and that was all I ever saw of Mr. McFarland in this case. Q. Was there any understanding as to when it was to be covered? (Objected to.)

A. That is always the understanding of insurance companies. The Court: State whether there was anything said on that subject. The jury can draw their own conclusions. Just state the fact. Q. What did he say about covering this policy? A. He said, 'I will write the policy.' That is what he said, and there was nothing said about time outside of that. That was the only time I have spoken to Mr. McFarland about the matter." The witness further testified in relation to the time when the fire occurred, the value of the stock in the factory at that time, the damage resulting thereto, and the amount of insurance thereon, including the sum of \$1,000, which defendant agreed to place. S. B. Rigger, being called as a witness for plaintiff, testified that he had eighteen years' experience as an insurance agent, whereupon he was asked the following question: "What is the general custom among insurance agents in dating policies that are to be written upon applications which are made to you orally, or made to insurance agents orally, and no specified time stated in the application as to when the policy shall be dated?" An objection to

this question having been overruled, and an exception allowed, the witness said: "In all cases of that kind it is considered that the insurance is to begin upon the date of the agreement; at noon of the date of the agreement. Q. At noon of the day of the agreement? A. Yes. It might be, of course, that the agreement was made in the forenoon. In my own practice I am always in the habit of dating the policy the day before, in order to cover the fraction of a day." It was admitted that Henry Hewett and F. L. Richmond, witnesses called on plaintiff's behalf, would testify to the same effect as the preceding witness. Plaintiff, having introduced the foregoing evidence, rested, whereupon defendant moved the court for a judgment of nonsuit, which being denied, an exception was saved.

1. It is argued by defendant's counsel that there was no evidence introduced at the trial tending to show the duration of the alleged insurance, the time when the risk should commence, or the amount of the premium to be paid, and hence the nonsuit should have been granted. Plaintiff's counsel insists, however, that, the defendant having introduced evidence after the motion for a nonsuit was denied, which is not included in the bill of exceptions, it must be assumed that any failure of proof on plaintiff's part to sustain the allegations of the complaint was cured by such evidence; that the time when the insurance should begin was proved by the evidence of the custom of insurance companies in this respect; and that it is reasonably inferable from the stipulation introduced in evidence by plaintiff that the usual time of insurance upon such risks is one year, and the customary rate on an indemnity of \$1,000 thereon is the sum of \$32.50. "In order to make a valid contract of insurance," says Mr. Wood, in his work on Fire Insurance (2 ed.) § 5, "several things must concur: First,

the subject-matter to which the policy is to attach, must exist; second, the risk insured against; third, the amount of the indemnity must be definitely fixed; fourth, the duration of the risk; and, fifth, the premium or consideration to be paid therefor must be agreed upon, and paid, or exist as a valid legal charge against the party insured where payment in advance is not a part of the condition upon which the policy is to attach. The absence of either or any of these requisites is fatal in cases where a parol contract of insurance is relied upon." It is not the duty of courts to make contracts for parties, but to interpret the engagements they have undertaken, and, in view of this legal principle, the rule is well settled that, before a contract of insurance or to insure can become binding, all these necessary elements must be understood, assented to, and agreed upon, either expressly or by implication, before there can be an absolute binding obligation between the parties: *May, Ins.* (3 ed.), § 50; 11 *Am. & Eng. Enc. Law* (1 ed.), 282; *Commercial Ins. Co. v. Morris*, 105 Ala. 498 (18 South. 34); *Sater v. Henry Ins. Co.*, 92 Iowa, 579 (61 N. W. 209); *Hartshorn v. Shoe Ins. Co.*, 15 Gray, 240; *Strohn v. Hartford Ins. Co.*, 37 Wis. 625 (19 Am. Rep. 777); *Trustees of First Baptist Church v. Brooklyn Fire Ins. Co.*, 28 N. Y. 153; *O'Reilly v. London Assurance Corp.*, 101 N. Y. 575 (5 N. E. 568); *Orient Ins. Co. v. Wright*, 23 How. 401. When a parol contract of insurance is relied upon to sustain a recovery of damages resulting from a breach of the agreement, or to enforce a specific performance of the terms which have been mutually assented to, the existence of the contract must be conclusively established: *McCann v. Aetna Ins. Co.*, 3 Neb. 198; *Neville v. Merchant's Ins. Co.*, 19 Ohio, 452. In the light of these rules, the evidence introduced by plaintiff will be examined with a view of ascertaining therefrom whether,

considering the same to be true in all respects, it is sufficient to support the verdict and judgment. It will be observed that Lindhard testified that in his conversation with McFarland, defendant's agent, nothing was said about time. The evidence therefore fails to show a meeting of the minds of the representatives of the contracting parties upon the questions as to when the risk should attach, or the duration thereof, unless these facts are inferred from the stipulation, or implied from the ordinary course of business.

2. The contention that defendant's testimony, introduced after the motion for a nonsuit was overruled, may have supplied the deficiency in plaintiff's evidence, is without merit; for defendant, having incorporated in the bill of exceptions the evidence introduced prior to the court's action upon the motion, has brought up for review the question passed upon, and if it appear therefrom that the court erred in its disposition of such question, the error will be presumed to be judicial, and, this being so, it was the duty of plaintiff to include in the bill of exceptions those portions of the evidence given by defendant, if any, tending to supply such deficiency: *Du Bois v. Perkins*, 21 Or. 189 (27 Pac. 1044).

3. Assuming, as we must, from the verdict of the jury, that an agreement was entered into between Lindhard and McFarland respecting an insurance of \$1,000 upon the stock located in the paint factory, that the risk was to attach on the day the contract of insurance was consummated, which fact may have been reasonably inferred from the evidence, though nothing was said by the parties in relation thereto, how can it be said from Lindhard's testimony that the duration of the risk was one year, or any other period? *Ostrander, Fire Ins.* p. 17, in referring to the elements of an insurance contract which must concur, as hereinbefore quoted from Wood, *Fire*

Ins., says: "We think Mr. Wood should have added also that the contract must be *in præsenti*." It has been held that, if nothing be said by the parties to an oral contract for insurance about the time when the undertaking becomes operative, the risk attaches and takes effect immediately upon the consummation of the agreement: *Potter v. Insurance Co.*, 63 Fed. 382. And in the case at bar we are of the opinion that no error was committed in permitting the witness to testify in relation to the custom of insurance companies in this respect for the purpose of explaining what was reasonably implied from the failure of the parties to specify the time when the insurance would take effect.

4. An agreement to insure, without specifying the premium to be paid, is held to be a contract to insure at the customary rates: *Wood, Fire Ins.* § 27; *Walker v. Metropolitan Ins. Co.*, 56 Me. 371; *Newark Mach. Co. v. Kenton Ins. Co.*, 50 Ohio St. 549 (22 L. R. A. 768, 35 N. E. 1060); *Salisbury v. Hekla Ins. Co.*, 32 Minn. 458 (21 N. W. 552); *Michigan Pipe Co. v. North British Ins. Co.*, 97 Mich. 493 (56 N. W. 849). Under this rule the stipulation introduced in evidence shows the usual rate upon such risks, and explains what was implied by the agreement in this respect.

5. So, too, the law will presume that the minds of the parties met upon an agreement containing the terms and conditions of a policy such as is usually issued by the contracting insurance company covering like risks: 1 May, Ins. (3 ed.), § 23; *Barre v. Council Bluffs Ins. Co.*, 76 Iowa, 609 (41 N. W. 373); *Smith v. State Ins. Co.*, 64 Iowa, 716 (21 N. W. 145); *Hubbard v. Hartford Ins. Co.*, 33 Iowa, 325 (11 Am. Rep. 125); *De Grove v. Metropolitan Ins. Co.*, 61 N. Y. 594 (19 Am. Rep. 305); *Eureka Ins. Co. v. Robinson*, 56 Pa. St. 256 (94 Am. Dec. 65); *Fuller v. Insurance Co.*, 36 Wis. 599; *Salisbury v. Hekla*

Ins. Co., 32 Minn. 458 (21 N. W. 552). But to support an action for damages resulting from a breach of such an agreement evidence must be introduced which tends to show, so far as necessary to sustain plaintiff's case, the terms and conditions usually contained in a policy issued in such cases.

6. There is an entire lack of evidence tending to show the duration of insurance issued by the defendant company upon risks similar to that in the case at bar, or as to what time would be implied in a contract of insurance when nothing had been said by the parties upon the subject, unless these facts are to be inferred from the stipulation in question. Defendant's counsel, referring to the premium of \$32.50 which was recited in the stipulation, says: "It is admitted that it was tendered, and that that was the usual and customary charge by insurance companies for a policy of \$1,000 described in the complaint." An insurance policy is the written evidence of an agreement by the terms of which the insurer, in consideration of a stipulated premium, undertakes to indemnify the insured against such damage as he may sustain by reason of injury to or destruction of the subject-matter by means of the risk insured against. No policy is described in the complaint, but defendant's counsel undoubtedly meant that the sum of \$32.50 was the customary premium upon a policy for the stipulated indemnity covering the stock of paints, oils, etc., within the paint factory, for the term of one year, from May 24, 1895, at 12 o'clock noon. So far as this language is concerned, it amounts to an admission that the usual premium for a given time and risk had been tendered; but nothing is said, however, in relation to the terms of the policy issued by the defendant company in such cases, and, so far as the evidence or admission is concerned, it may be that its policies were issued for greater or less periods than one year.

7. It is insisted by plaintiff's counsel, however, that the elements of the agreement for insurance are presumed to have been contained in the stipulation which was received in evidence, and that, defendant having failed to incorporate it in the bill of exceptions, it should be held, in order to uphold the judgment, that the facts necessary to prove the case were established thereby. It is a rule of practice that when the transcript shows that the record contained a paper which may have included recitals that would sustain the judgment, and which the court was bound to consider in rendering its decision, the appellant must include such paper in the bill of exceptions, and, if he does not do so, the appellate court will presume that the judgment appealed from is correct: *Fisher v. Kelly*, 26 Or. 249 (38 Pac. 67); *Huffaker v. Bank*, 13 Bush, 644; *Bowman v. Holloway*, 14 Bush, 426; *Elliott v. Round Mountain Iron Co.*, 108 Ala. 640 (18 South. 689); *City of Covington v. Chesapeake & Ohio Ry. Co.* (Ky.), 20 S. W. 538; *McNew v. Williams* (Ky.), 36 S. W. 687; *Eastin v. Ferguson*, 4 Tex. Civ. App. 643 (23 S. W. 918); *Flenner v. Walker*, 5 Tex. Civ. App. 145 (23 S. W. 1029).

8. But the presumption invoked in such cases is not conclusive, and must yield to evidence which overcomes it. In the case at bar the judge appended to the bill of exceptions the following certificate: "The foregoing constitutes all of the testimony of plaintiff herein introduced or received upon the trial of this cause, and upon which it relies to sustain the verdict, and there is no other testimony in the case, introduced by either plaintiff or defendant, tending to sanction, or which can be claimed as tending to sanction, said verdict." While this certificate refers to testimony only, in our judgment it is broad enough to include evidence, and, this being so, it overcomes the presumption which is sought to be

indulged, and shows that the verdict is not supported by the evidence; and hence it follows that the judgment is reversed, and the cause remanded for further proceedings, not inconsistent with this opinion.

REVERSED.

Argued 14 November; decided 19 December, 1898.

DAYTON v. MULTNOMAH COUNTY.

[55 Pac. 23.]

34	239
38	437

1. **STATE BOARD OF EQUALIZATION—NECESSARY RECORD.**—Under the law of 1891, the record on which the State Board of Equalization proceeds to equalize the assessments between different counties is an abstract of the different county records, and it is not necessary that the original rolls be filed at all: *Dayton v. Board of Equalization*, 33 Or. 131, approved.
2. **IRREGULAR CLASSIFICATION.**—The fact that a designated class of property has been subdivided by a county assessor will not invalidate the roll, for by adding the subdivisions the required classification is obtained: *Dayton v. Board of Equalization*, 33 Or. 131, approved.
3. **JUDICIAL NOTICE.**—The courts cannot take judicial knowledge that values have been unreasonably increased or diminished under a system adopted for ultimate equalization.
4. **REVIEW OF PROCEEDINGS OF BOARD OF EQUALIZATION.**—The appellate court will not disturb the judgment and findings of a board of equalization where it is not shown that the board acted arbitrarily or fraudulently in the equalization of values.
5. **EQUALITY AND UNIFORMITY OF TAXATION.**—The failure of the board of equalization properly to equalize assessments upon personal property throughout the several counties of the state does not produce such lack of equality and uniformity of taxation* as to invalidate its acts in equalizing values upon real property.
6. **INJUNCTION—TENDER OF TAX.**—A suit to enjoin the collection of part of a tax levy cannot be entertained until there has been a payment or tender of the amount admitted to be legal: *Goodnough v. Powell*, 23 Or. 525, approved.

From Multnomah: JOHN B. CLELAND, Judge.

This suit was brought by Frank Dayton against Multnomah County to restrain the collection of certain taxes.

*The Oregon Constitution has two sections to which this paragraph may refer: Article I, § 32 * * * "and all taxation shall be equal and uniform." Article IX, § 1, "The legislative assembly shall provide by law for uniform and equal rate of assessment and taxation," etc.—REPORTER.

The State Board of Equalization, at its meeting in 1896, equalized the values as assessed by raising the assessment on certain classes of property in Multnomah County nearly \$6,000,000, and raising the same classes of property in all the rest of the state about \$3,500,000. In *Dayton v. Board of Equalization*, 33 Or. 131, this equalizing was declared void as to merchandise, and the tax levied on the increased valuation was annulled. Now this suit is brought to enjoin the collection of the tax on the increased value of the real estate. A decree was entered for defendants.

AFFIRMED.

For appellant there was an oral argument by *Mr. Edward B. Watson*, with a brief over the names of *Joseph Simon, E. B. Watson, Joseph & Meier, and Frank Schlegel*, to this effect:

(1). The state board had no jurisdiction, for the reasons that it had no certified copy of the assessment roll of Marion County before it, and none had either been transmitted to the Secretary of State, or even prepared or authenticated, as prescribed by law, when the board adjourned: 2 Hill's Ann. Laws, § 2788; *Oregon & California R. R. Co. v. Croisan*, 22 Or. 393, 400; *State v. Linn County*, 25 Or. 503, 504; *Dayton v. Board of Equalization*, 33 Or. 131 (50 Pac. 1009); *State v. Dodge County*, 20 Neb. 595 (31 N. W. 117, 121); *Moser v. White*, 29 Mich. 59; *Williams v. Mears*, 61 Mich. 86 (27 N. W. 863, 864).

(2). The divisions of real property into classes not provided for in the statute, and the assessment of each separately was an illegal classification, and therefore afforded no basis for the attempted equalization of state board: *Oregon & California R. R. Co. v. Croisan*, 22 Or. 393.

(3). The increase in the aggregate valuation of all property in the state, \$9,414,549, does not appear from the record of the proceedings of the state board to have been "reasonably necessary to a just equalization," and could not have been "reasonably necessary" for that purpose, and is therefore void as being within the prohibition of the statutes: 2 Hill's Ann. Laws, p. 2006, § 6; *Suydam v. County of Merrick*, 19 Neb. 155 (27 N. W. 142); *State v. Dodge County*, 20 Neb. 595 (31 N. W. 117); *People v. Lathrop*, 3 Colo. 428; *State v. State Board of Equalization*, 18 Mont. 473 (46 Pac. 266-268).

(4). The increase in the assessment of real property in Multnomah County of \$5,397,625, and that form of personal property described as "merchandise and stock in trade," in the same county, of \$589,922, making a total of \$5,987,547, against the presumption from the record that the original assessment of said property was correct and just, and without any evidence to overcome such presumption, or justify any increase, and without any discussion or consultation between a majority of the members of the board, who voted for such increase, and the minority, who voted against it, affords sufficient evidence that such majority did intentionally discriminate against the taxpayers of Multnomah County in voting said increase, and that the same was therefore inequitable in fact, and fraudulent in law, and should be enjoined: *Oregon Coal Co. v. Coos County*, 30 Or. 308; *Hotel Co. v. Biebe*, 86 Ill. 602; *Spring Valley Coal Co. v. People*, 157 Ill. 543 (41 N. E. 874); *Keokuk Bridge Co. v. People*, 161 Ill. 514 (46 N. E. 206); 1 High, Inj. (3 ed.), § 494.

For respondent there was a brief over the names of *R. & E. B. Williams*, and *Russell E. Sewall*, District Attorney, with an oral argument by *Mr. Richard Williams*.

MR. CHIEF JUSTICE WOLVERTON delivered the opinion.

This suit was instituted by plaintiff, in behalf of himself and others similarly situated, to enjoin the collection by the Sheriff of Multnomah County of all taxes represented by the increased valuations placed upon "town and city lots," "improvements upon town and city lots," and "merchandise and stock in trade," by the State Board of Equalization at its regular session in December, 1896. The increase which the board attempted to make was twenty per cent. upon town and city lots and their improvements, under one classification, and twenty-five per cent. on merchandise and stock in trade within Multnomah County. The same matters are urged here that were presented and passed upon in the recent case of *Dayton v. Board of Equalization*, 33 Or. 131 (50 Pac. 1009), with an additional question which it is claimed results from the decision there announced. It is claimed, furthermore, that the sole question involved in that case was the validity of the attempted equalization of values upon "merchandise and stock in trade," and that the consideration of the other questions passed upon was unnecessary to a determination of the cause, and for that reason, as it pertains to those questions, the decision has not the force of a precedent; hence we are asked to review it, as to them, upon this hearing.

1. It was urged there, as here, that the board failed to acquire jurisdiction to proceed in the discharge of its statutory functions, for two reasons: First, because no certified copy of the assessment roll of Marion County, as equalized by the county board, had, previous to the adjournment of the state board, been received by the Secretary of State; and, second, because the assessors of the several counties of the state had valued real

property upon the rolls under different heads or classifications from those which the state board is required to adopt in its work of equalization between the counties. As it pertains to the first objection, the present case is slightly different from the former. It is clearly shown here that the original roll of Marion County, as equalized by the county board, was actually before the State Board of Equalization while in session—a fact which was only inferred in the former proceeding—and that its secretary made abstracts from it for the use of the board, which were used in the process of equalization, but the question of jurisdiction was resolved upon the identical facts as now proven. The facts upon which the second objection is based are identical in each case.

2. A consideration of the latter objection necessarily involved the manner and form by which the board was required to proceed in the discharge of its functions; and it was held that, while the assessors had valued real property by subdivided classifications, it was only necessary, through the mental application of the simple process of addition, to resolve such classifications by aggregates to the two classifications which the board is required to adopt in the exercise of its powers, and therefore that the board had properly equalized real property under two classifications only—a deduction quite natural and necessary from the premises. Now it is said that the discussion of neither of these questions was involved or necessary to the determination of the question which was resolved in harmony with counsel's contention against the regularity of the proceedings of the board, whereby it was held that its action touching the equalization of personal property was without authority of law and void, because the board had attempted to equalize by classifications of that species of property not uniform throughout the several counties of the state.

The object of that proceeding, as here, was to test the legality of every step by which the board proceeded in its equalization of the assessments between the several counties of the state at that particular session; and hence its jurisdiction to entertain cognizance of the subject-matter was first attacked, and then followed the contentions touching the regularity of its proceedings, and it does seem to us that all these questions were fairly involved in the former proceeding. It may be said that neither of these jurisdictional questions constituted the very *lis mota* which proved to be involved in the controversy, but they were questions vital to the powers of the board to entertain cognizance of the matters which gave rise to the pivotal dispute, and we think were properly considered in that cause. But, however that may be, suffice it to say we have taken the pains to review our former holdings, and find no reason for revising them.

3. It is objected that the board unnecessarily and unreasonably increased the aggregate of valuations upon real property, and for this reason its acts in equalizing such valuations are without validity. It is provided by section 6 of the act creating it (Laws, 1891, p. 182) that the board "shall equalize the assessment as hereinafter provided, but said board shall not reduce, nor shall it increase, the aggregate valuations, except in such amount as may be reasonably necessary to a just equalization;" and by section 8 that "said board shall add to the aggregate valuation of the real and several kinds or classes of personal property of every county which they believe to be valued below the true and fair value thereof in money, such per centum in each case as will bring the same to its true and fair value in money; they shall deduct from the aggregate valuation of the real and several kinds or classes of personal property of every county which they

believe to be valued above the true and fair value thereof in money, such per centum in each case as will reduce the same to the true and fair value in money." By legislative intendment money was made the standard by which the board is required to equalize values, and, it not appearing that it has proceeded otherwise, it must be taken to have properly discharged its duties in that respect. This is practically the holding in *Smith v. Kelly*, 24 Or. 464 (33 Pac. 642). The court cannot take judicial knowledge that values have been unreasonably increased or diminished under the system adopted in this state for ultimate equalization.

4. As it regards the alleged discrimination by the board against Multnomah County, it is very clear that the evidence produced at the trial does not show that the board acted willfully, arbitrarily, or fraudulently in the equalization of values as it pertained to said county, and hence we cannot disturb its findings and judgment on that contention.

5. The contention of counsel that the decision of the court in the former case, declaring the acts of the board void as they pertained to its attempted equalization of personal property, is inimical to uniformity, and hence to the validity of its equalization of values, as it pertained to the two classes of real property, is not without merit. But we are still of the opinion, however, that the rule that the failure of an assessment in particular instances does not avoid the entire assessment applies to the action of the board. Mr. Justice MILLER, of the Supreme Court of the United States, in passing upon the validity of an assessment under a statute which exempted railroad property from all other taxes, except one per cent. per annum, to be paid into the treasury, in alleged contravention of the state constitution, which declared that all taxation shall be uniform, after stating

that the constitutional question was not involved in the controversy, says: "It is not inappropriate to look to the consequences of holding that this failure to assess the railroads renders all other taxes void. It applies to the tax assessed for all other purposes as well as this tax. Every nonresident holder of property in the state could apply to me, and insist on an injunction against the tax on his property. And, if the state judges believe it to be void, they would be bound, on the same principle, to suspend the collection of all taxes throughout the entire state. A proposition which leads inevitably to such a result cannot be sound. I cannot, therefore, grant an injunction on this ground, whether the railroad property is liable to taxation or not." *Muscantine v. Mississippi, etc. R. R. Co.*, 1 Dill. 536, 542 (Fed. Cas. No. 9,971). In that case the result of the nonassessment of railroad property was quite as far-reaching as the nonequalization of personal property in the one at bar. The same doctrine is applied where the mistake arises from a misapprehension of the law: *People v. McCreery*, 34 Cal. 432, 458, 459. See, also, *Cooley, Tax'n*, 154-156. And the court is not without precedent for its decision in *Dayton v. Board of Equalization*. See *Orr v. State Board of Equalization*, 2 Idaho, 923 (28 Pac. 416). We are therefore constrained to hold that the failure of the board to properly equalize the assessments upon personal property throughout the several counties of the state did not invalidate its acts in equalizing values upon the two classes of real property, and is, therefore, not inimical to uniformity and equality of assessment and taxation as required by the constitution.

6. But, aside from all these questions, there is another which precludes us from granting the relief demanded by plaintiff; and that is, he has not tendered payment of the taxes which it is admitted were due, and

against which he has no cause to complain. Such taxes should be paid or tendered, before a suit will lie to enjoin that which is illegal or void: *Goodnough v. Powell*, 23 Or. 525 (32 Pac. 396). Nor does it make any difference that the suit is to avoid those only which are claimed to be illegal. The rule of application is the same in either case. These considerations affirm the decree of the court below, and it is so ordered.

AFFIRMED.

Decided 7 November; rehearing denied 19 December, 1898.

MAST v. KERN.

[54 Pac. 950.]

WHO ARE FELLOW SERVANTS.—The character of the act in the performance of which the injury arises, and not the grade or rank of the negligent employee, is the test whether an negligent employee is the vice-principal or fellow servant of an injured employee.

MASTER AND SERVANT—INJURY TO EMPLOYEE.—The negligence of the superintendent and manager of a quarry, having power to hire and discharge employees, in directing workmen with whom he is engaged in blasting to put powder into a hole, without waiting a sufficient time for the hole to cool after giant powder had been exploded therein, for the purpose of drying it, is that of a fellow-servant, and not of a vice-principal.

From Coos: J. C. FULLERTON, Judge.

Action by W. L. Mast against Daniel Kern. This action is brought to recover damages for an injury alleged to have been sustained through defendant's negligence. At the time of the accident which caused his injury, the plaintiff was, and for some months prior thereto had been, working for the defendant in a stone quarry at Coos Bay, engaged with other employees in excavating and removing rock by blasting, under the direction and supervision of one West, who was the superintendent and manager, with power to hire and

34	247
34	259
34	285
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40	402
40	440
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42	541
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discharge employees. On the day of the accident the plaintiff and a fellow workman had drilled a hole in the rock, preparatory to putting in a blast; but, before loading it, the superintendent dropped in the hole two or three sticks of giant powder, which he caused to be exploded for the purpose of drying it out. After waiting a few minutes for any fire which the powder might leave in the hole to expire, West inquired of plaintiff whether he thought it was ready to load, and the plaintiff replied, "I don't know whether it is or not." West then said, "I guess it is all right; we will try it," and poured some powder into the hole; and, as it did not take fire, he said he thought it was safe, and directed the plaintiff and his fellow workman to put in the black powder; and while they were engaged in doing so an explosion occurred, by which plaintiff received the injury for which he brings this action. The ground of recovery alleged in the complaint is that West was negligent in not waiting a sufficient length of time for the hole to cool after the giant powder had been exploded therein, and in not ascertaining whether there was any fire remaining in the hole before directing the plaintiff and his fellow workman to put the black powder in. The court below directed a nonsuit, and plaintiff appeals.

AFFIRMED.

For appellant there was a brief over the names of *Watson, Beckman & Watson, D. L. Watson*, and *D. L. Watson Jr.*, with an oral argument by *Mr. Edward Byars Watson*.

For respondent there was a brief over the names of *J. W. Bennett*, and *Dolph, Mallory & Simon*.

MR. JUSTICE BEAN, after stating the facts, delivered the opinion.

The motion for nonsuit was, it is stated in the briefs, allowed on the ground that when the plaintiff, with full knowledge of the situation, without protest or objection, undertook to load the hole as directed by West, he knowingly and voluntarily assumed the risks of a premature explosion; and we are not prepared to say at this time that the court was in error in so ruling: *Brown v. Oregon Lumber Co.*, 24 Or. 315 (33 Pac. 557). But, however that may be, the judgment of nonsuit must be sustained for the reason that the negligence of West, if any, was, under the circumstances, the negligence of a co-servant, for which the defendant is not liable. It is familiar law that a servant assumes, as one of the incidents of his employment, all risks of injury from the negligence of a fellow servant, because the master cannot, by the exercise of the utmost care and caution, guard against such negligence. But the courts differ somewhat as to who is a fellow servant, within the meaning of this rule. There are practically two lines of decisions upon the question. On the one hand it is held, adopting the superior servant criterion, that when the master has given to an employee supervisory control and management of his business, or some particular department thereof, such person, while so acting, stands in the place of the master, as to those under his direction and supervision, and for his negligence the master is liable. This is known in the books as the "Ohio doctrine," and was adopted in effect by the Supreme Court of the United States in *Chicago, etc. Ry. Co. v. Ross*, 112 U. S. 377* (5 Sup. Ct. 184, 17 Am. & Eng. R. R. Cas. 514-519), but that case has been very much modified, if not in effect practically overruled, by the subsequent case of *Baltimore R. R. Co. v. Baugh*, 149 U.

*NOTE.—This case has now been distinctly overruled by the Supreme Court of the United States in a very comprehensive opinion: *New Eng. R. R. Co. v. Conroy*, — U. S. — (20 Sup. Ct. 84).—REPORTER.

S. 368 (13 Sup. Ct. 914). Under this rule the liability of the master is made to depend upon the rank or grade of the person whose negligence caused the injury. On the other hand, the rule, and the one now unquestionably established and supported by the great weight of authority, both in this country and in England, is that the liability of the master depends upon the character of the act in the performance of which the injury arises, and not the grade or rank of the negligent employee. If the act is one pertaining to the duty the master owes to his servant, he is responsible for the manner of its performance, without regard to the rank of the servant or employee to whom it is entrusted; but, if it is one pertaining only to the duty of an operative, the employee performing it is a fellow servant with his co-laborers, whatever his rank, for whose negligence the master is not liable: McKinney, Fel. Ser. § 43 *et seq.*; Bailey, Mast. Liab. 226 *et seq.*; Wood, Mast. & S. § 438; 24 Am. Law Rev. 175; 25 Am. Law Reg. 481; *Crispin v. Babbitt*, 81 N. Y. 516 (37 Am. Rep. 521); *McCosker v. Long Island R. R. Co.*, 84 N. Y. 77; *Hussey v. Cogger*, 112 N. Y. 614 (8 Am. St. Rep. 787, 3 L. R. A. 559, 20 N. E. 556); *Brown v. Winona R. R. Co.*, 27 Minn. 162 (38 Am. Rep. 285, 6 N. W. 484); *Ell v. Northern Pac. R. R. Co.*, 1 N. D. 336 (26 Am. St. Rep. 621, 12 L. R. A. 97, 48 N. W. 222); *Sayward v. Carlson*, 1 Wash. St. 29 (23 Pac. 830). Many other authorities could be cited to the same effect, but these are sufficient to show the irresistible current of the decisions, as well as the ground upon which the doctrine rests, and its application to given facts.

And so is the logical result of the former decisions of this court, as the liability of the master for an injury to a servant, caused by the negligence of another employee, has always been made to depend upon the character of

the act causing the injury, rather than the grade or rank of the offending employee: *Anderson v. Bennett*, 16 Or. 515 (8 Am. St. Rep. 311, 19 Pac. 765); *Hartvig v. Northern Pacific Lumber Co.*, 19 Or. 522 (25 Pac. 358); *Miller v. Southern Pacific Co.*, 20 Or. 285 (26 Pac. 70); *Carlson v. Oregon Short Line Ry. Co.*, 21 Or. 450 (28 Pac. 497); *Fisher v. Oregon Short Line Ry. Co.*, 22 Or. 533 (16 L. R. A. 519, 30 Pac. 425). It is the personal and absolute duty of the master to exercise reasonable care and caution to provide his servants with a reasonably safe place to work, reasonably safe tools, appliances, and instruments to work with, reasonably safe material to work upon, suitable and competent fellow servants to work with them, and to make needful rules and regulations for the safe conduct of the work; and he cannot delegate this duty to a servant of any grade so as to exempt himself from liability to a servant who has been injured by its nonperformance. Whoever he intrusts with its performance, whatever his grade or rank, stands in place of the master, and he is liable for the negligence of such employee to the same extent as if he had himself performed the act, or been guilty of the negligence. But when the master has performed his duty in this regard, and provided competent employees, a reasonably safe place to work, suitable materials, tools, and appliances to work with, and needful rules and regulations, and the like, he has discharged his whole duty in the premises, and is not liable to a servant for the negligence of another servant while engaged as an operative. It is true that from this doctrine results the conclusion that an employee may in certain cases occupy a dual position to his fellow workmen. He may be a vice-principal or the representative of the master as to all matters where he is intrusted with the discharge of duties which the master himself is required to perform,

and a co-servant in the discharge of duties not personal to the master. But this conclusion is a logical one, and has been recognized and applied under many varieties of facts. See McKinney, Fel. Serv. note to section 42.

The true test in all cases by which it may be determined whether the negligent act causing the injury is chargeable to the master, or is the act of a co-servant, is, was the offending employee in the performance of the master's duty, or charged therewith, in reference to the particular act causing the injury? If he was, his negligence is that of the master, and the liability follows; if not, he was a mere co-servant, engaged in a common employment with the injured servant, without reference to his grade or rank, or his right to employ or discharge men, or to his control over them. In short, the master is liable for the negligence of an employee who represents him in the discharge of his personal duties towards his servants. Beyond this he is liable only for his own personal negligence. "This," as said by Judge Dillon, "is a plain, sound, safe, and practical line of distinction. We know where to find it, and how to define it. It begins and ends with the personal duties of the master. Any attempt to refine based upon the notion of 'grades' in the service, or, what is much the same thing, distinct 'departments' in the service (which departments frequently exist only in the imagination of the judges, and not in fact), will only breed the confusion of the Ohio and Kentucky experiments, whose courts have constructed a labyrinth in which the judges who made it seem to be able to 'find no end in wandering mazes lost:'" 24 Am. Law Rev. 189. Now, under this rule it is clear that defendant is not liable for the act of West in directing the plaintiff to load the hole, even if it was neglect; for he was not then engaged in the discharge of any duty which the master owed to the plaintiff, but

was a fellow servant, the risk of whose negligence was assumed by the plaintiff when he entered upon the employment. There is no pretense that West was not a fit and competent person to have charge of the work, or that the master was negligent in employing him, but the sole ground of liability alleged is the negligence of West in a matter not pertaining to any duty the defendant owed to the plaintiff. It follows from these views that the judgment of the court below must be affirmed, and it is so ordered.

AFFIRMED.

Argued 5 December, 1898; decided 3 January, 1899.

BOYES v. RAMSDEN.

[55 Pac. 538.]

1. AGREEMENT TO MODIFY CONTRACT—EVIDENCE.—An agreement to modify a prior agreement must be established by clear and satisfactory evidence: *Watson v. Janion*, 6 Or. 137, applied.
2. EQUITY—SPECIFIC PERFORMANCE—ADEQUATE REMEDY.—Equity can compel the delivery of a deed for property that has been paid for, or adjudge that the decree declaring the rights of the plaintiff stand as and for such deed; replevin would not be an adequate remedy where the deed had been destroyed or never executed.

From Marion: HENRY H. HEWITT, Judge.

Suit by Anna M. Boyes to compel W. T. Ramsden to deliver a deed of certain real property to plaintiff, or, if delivery thereof cannot be had, then for a decree that she is the owner of the premises described therein, and that defendant be required to execute another deed thereto, and deliver the same to her. The facts are that plaintiff, in consideration of defendant's executing to her a deed to lots 7 and 8, in block 24, in North Salem, Marion County, Oregon, of which he was the owner, executed to

him a deed of all her interest in certain other real property; and it was agreed that said deeds should be deposited with a third person, to be delivered by him to the respective grantees upon the happening of a certain event; that the respective deeds were executed on November 12, 1892, and the plaintiff deposited hers with the person agreed upon, but the defendant, instead of depositing his deed with said person, as plaintiff supposed he had done, retained the same, and thereafter destroyed it; that, upon the execution of defendant's deed, plaintiff entered into possession of said lots, by her tenants, since which time she has received the rents therefrom, and paid the taxes thereon; that, the event having transpired upon the happening of which said deeds were to be exchanged, defendant obtained from the depository the deed executed by plaintiff. The defendant, after denying the material allegations of the complaint, alleges that, after the execution of said deeds, he entered into another contract with plaintiff, whereby, in consideration of \$25 in money, a horse, buggy, and harness, paid and delivered to her by defendant, she surrendered to him all her interest in said lots, and agreed that said deed might be destroyed. The reply having put in issue the allegations of new matter contained in the answer, a trial was had, resulting in a decree that plaintiff was the owner in fee of said lots, and that defendant execute and deliver to her a deed thereto within thirty days, but, if default be made in complying therewith, that the decree stand as and for the deed; and defendant appeals.

AFFIRMED.

For appellant there was a brief over the name of *Ford & Kaiser*, with an oral argument by *Mr. Wm. Kaiser*.

For respondent there was a brief over the name of *Weatherford & Wyatt*, with an oral argument by *Mr. James K. Weatherford*.

MR. JUSTICE MOORE, after stating the facts, delivered the opinion of the court.

It would be impossible to reconcile the conflict in the testimony of the parties in relation to the new agreement set up by defendant. That plaintiff received from him the said money and personal property is amply proven; but she testifies that the money was paid, and the horse, buggy, and harness were delivered to her, for another and different consideration, and that she never consented to the destruction of said deed. In *Watson v. Janion*, 6 Or. 137, it was held that a subsequent agreement will not operate to extinguish a former contract entered into between the parties, unless it is expressly accepted by them for that purpose, and that the evidence of an intention to modify the prior agreement must be clear and satisfactory. Tested by this rule, we are not prepared to say that the evidence of the intention of the parties to modify the prior agreement is so clear and convincing as to overcome the finding of the court below, which had the opportunity of seeing the witnesses, hearing them testify, and thereby being better able to determine the weight of the testimony than this court can be from an inspection of the record; and hence we must conclude that the facts are established as found by the court, and the only question remaining is whether the suit instituted is the proper remedy.

Defendant's counsel contends that the plaintiff had an adequate remedy by an action at law for the recovery of the deed in question, and, this being so, the court erred in not dismissing the suit in equity. It has been held

that replevin will lie to recover title deeds: 20 Am. & Eng. Enc. Law (1 ed.), 1062. In this country, under our recording acts, the value of a deed, after it has been copied into the proper records, cannot ordinarily be commensurate with the value of the premises conveyed; but if the deed be in existence, and capable of delivery, it is probable an action for its recovery would be adequate to obtain the evidence of the transfer of the title; but where, as in the case at bar, defendant had destroyed the deed, the remedy must necessarily prove unavailing: *Wilson v. Rybolt*, 17 Ind. 391 (79 Am. Dec. 486). Mr. Willard, in his work on Equity Jurisprudence (page 307), says: "The delivery up of deeds and other instruments to the party entitled to them, when they are improperly withheld, is an ancient head of equity jurisprudence." To the same effect see 2 Story, Eq. Jur. § 703; *Snoddy v. Finch*, 9 Rich. Eq. 355 (70 Am. Dec. 216), *Pomeroy*, Spec. Perf. Cont. § 13, and cases cited in note 1. We think, in view of the facts of the case, that the remedy adopted was proper, and hence it follows that the decree is affirmed.

AFFIRMED.

Argued 22 December, 1898; decided 13 February, 1899.

BRUNELL v. SOUTHERN PACIFIC COMPANY.

[56 Pac. 129.]

INJURY TO EMPLOYEE—NEGLIGENCE OF FELLOW SERVANT.—Plaintiff was an experienced section hand, surfacing defendant's track about three-fourths of a mile from a station. He knew that bridge carpenters would run a hand car toward him from the station while he was at work. It was possible to see their approach the whole distance. No signal warned the men on the car of the men at work on the track, and while plaintiff's back was turned the car approached at the expected time; but he did not hear it, on account of the noise from their work. He and his fellow workmen sprang aside, and one carelessly dropped his tamping bar. The car struck it and threw it against plaintiff, breaking his leg. *Held*, that his injury was due to the negligence of his fellow servants, and to his own carelessness.

WHEN EMPLOYEES ARE FELLOW SERVANTS—The rule is now established in Oregon that in determining whether two persons were or were not fellow servants the character of the act causing the injury, and not the grade of the offending employee, is the test: *Mast v. Kern*, 84 Or. 247, cited.

DUTY OF RAILROAD TO EMPLOYEE.—A railroad company is not bound to keep a signal to warn workmen on a hand car of the situation of section men at work on the track.

From Multnomah: E. D. SHATTUCK, Judge.

Action by Victor Brunell against the Southern Pacific Company. From a judgment for plaintiff, defendant appeals.

REVERSED.

For appellant there was a brief over the name of *Bronaugh, McArthur, Fenton & Bronaugh*, with an oral argument by *Mr. William D. Fenton*.

For respondent there was a brief and an oral argument by *Mr. Dell Stuart*.

MR. JUSTICE MOORE delivered the opinion of the court.

This is an action to recover damages for an injury alleged to have been caused by defendant's negligence. The plaintiff, an experienced section hand, about twenty-two years old, was at the time of the accident employed with other laborers in surfacing the track on a spur of defendant's railroad leading from Sheridan easterly to Sheridan Junction, and while so engaged a hand car coming from Sheridan, propelled by bridge carpenters, suddenly came up behind plaintiff, who, with his fellow laborers, jumped from the track; but one of them, in his hurry to escape danger, dropped his tamping bar, which, being struck by the car, was thrown against plaintiff, breaking his leg. It appears that a train left Sheridan each morning at 6 o'clock, and that no other

train or engine could pass over the line during the day, unless it came from Sheridan Junction, in view of which the overseer in charge of the men with whom plaintiff worked placed a flag beside the track to the east of them, but none to the west. The injury occurred about three-fourths of a mile east of Sheridan, from which place the railroad is built in a straight line over an open, level prairie, and it was possible for plaintiff to have seen a moving hand car on the track anywhere between him and the station. True, plaintiff had been in defendant's employ only four days, but he knew that the men engaged in repairing bridges passed over the track on a hand car, leaving Sheridan each morning at about 7 o'clock, and returning in the evening. The negligence alleged as constituting the cause of action consists in defendant's failure to place a signal beside the track west of the place where plaintiff was working, or to set a person to watch the approach of hand cars coming from that direction. The answer, having denied the material allegations of the complaint, averred that the injury was caused by plaintiff's negligence and the carelessness of his fellow servants. The cause, being at issue, was tried, resulting in a judgment for plaintiff for the sum of \$700, and defendant appeals.

It is contended by defendant's counsel that the evidence introduced at the trial, the substance of which is hereinbefore stated, fails to show any breach of his client's duty, and hence the court erred in denying his motion for a judgment of nonsuit; while plaintiff's counsel maintains that defendant was in duty bound to exercise reasonable care to select a safe place in which plaintiff should perform the service demanded of him, but having failed to set a signal, or to place a person to watch the approach of hand cars coming from the west, the place was rendered dangerous, in consequence of which the

defendant is liable for the injury which resulted from its negligence in this respect.

One of the rules of the common law is that the master must exercise reasonable care to provide a suitable place in which the servant can perform the labor demanded of him, without being exposed to dangers which do not of necessity attend the exercise of the employment, and that the master cannot delegate the performance of this duty to a subordinate, and thus escape the effect of the latter's negligence, but that the person so selected to provide a suitable place, though he may be a fellow servant of the person injured by his negligence, is *pro hac vice* a representative of the master: Buswell, Pers. Inj., § 192: McKinney, Fell. Serv., § 29; *Anderson v. Bennett*, 16 Or. 515 (19 Pac. 765); *Knahtla v. Oregon Short Line Ry. Co.*, 21 Or. 136 (27 Pac. 91); *Mast v. Kern*, 34 Or. 247 (54 Pac. 950); *Smith v. Peninsular Car Works*, 60 Mich. 501 (1 Am. St. Rep. 542, 27 N. W. 662); *Coombs v. New Bedford Cordage Co.*, 102 Mass. 572 (3 Am. Rep. 506); *Sweat v. Boston, etc. R. R. Co.*, 156 Mass. 284 (31 N. E. 296); *Ryan v. Fowler*, 24 N. Y. 410 (82 Am. Dec. 315); *Filbert v. Delaware Canal Co.*, 121 N. Y. 207 (23 N. E. 1104); *Kaspari v. Marsh*, 74 Wis. 562 (43 N. W. 368).

This rule, as applied to a railroad company, requires it, in providing a safe place in which to perform the labor demanded of a servant, to exercise ordinary and reasonable care—having regard to the hazard of the service—to put its roadbed and tracks in a reasonably safe condition, and to exercise like care to keep them in repair and free from obstruction: *Colorado Central R. R. Co. v. Ogden*, 3 Colo. 499; *Atcheson, etc. R. R. Co. v. Myers*, 11 C. C. A. 439, 63 Fed. 793; *Louisville, etc. R. R. Co. v. Johnson*, 27 C. C. A. 367, 81 Fed. 679; *Bowen v. Chicago, etc. Ry. Co.*, 95 Mo. 268 (8 S. W. 230); *O'Donnell v. Alleghaney R. R. Co.*, 59 Pa. St. 239 (98 Am. Dec. 336);

Calvo v. Charlotte R. R. Co., 23 S. C. 526 (55 Am. Rep. 28); *Torian's Administrator v. Richmond R. R. Co.*, 84 Va. 192 (4 S. E. 339); *Bessex v. Chicago, etc. Ry. Co.*, 45 Wis. 477.

To entitle a servant, however, to recover damages for an injury caused by the alleged negligence of the master in failing to exercise ordinary and reasonable care in putting or keeping in good condition the place in which the service is to be performed, the evidence must show that the master knew, or ought to have known, of the defect which rendered the place dangerous, and that the servant, notwithstanding he exercised ordinary and reasonable care to protect himself, was ignorant of the peril to which he was exposed: *Griffiths v. London Docks Co.*, 13 Q. B. Div. 259; *Thomas v. Quartermaine*, 18 Q. B. Div. 685; *Louisville R. R. Co. v. Campbell*, 97 Ala. 147 (12 South. 574); *Erskine v. Chino Beet-Sugar Co.*, 71 Fed. 270; *Richardson v. Cooper*, 88 Ill. 270; *Louisville, etc. Ry. Co. v. Corps*, 124 Ind. 427 (8 L. R. A. 636, 24 N. E. 1046); *Matchett v. Cincinnati, etc. Ry. Co.*, 132 Ind. 334 (31 N. E. 792); *New Kentucky Coal Co. v. Albani*, 12 Ind. App. 497 (40 N. E. 702); *Buzzell v. Laconia Mfg. Co.*, 48 Me. 113 (77 Am. Dec. 212); *Laning v. New York, etc. R. R. Co.*, 49 N. Y. 521; *Mixter v. Imperial Coal Co.*, 152 Pa. St. 395 (25 Atl. 587).

The following cases, cited and relied upon by plaintiff's counsel to sustain the judgment, illustrate the legal principle that the defect which rendered the place dangerous was open, and the master could have discovered it by the exercise of reasonable diligence, but the servant, relying upon the presumption that this duty had been fully discharged, was injured without knowledge of the peril to which he was negligently endangered: *Anderson v. Bennett*, 16 Or. 515 (19 Pac. 765); *Lewis v. Railroad Co.*, 59 Mo. 495 (21 Am. Rep. 385); *Hall v. Missouri Pac. Ry. Co.*,

74 Mo. 298; *Vautrain v. St. Louis, etc. Ry. Co.*, 8 Mo. App. 538; *Snow v. Housatonic R. R. Co.*, 8 Allen, 44 (85 Am. Dec. 720); *Moon's Administrator v. Richmond, etc. R. R. Co.*, 78 Va. 745 (49 Am. Rep. 401); *Hulehan v. Green Bay, etc. R. R. Co.*, 68 Wis. 520 (32 N. W. 529); *Davis v. Central Vermont R. R. Co.*, 55 Vt. 84 (45 Am. Rep. 590).

In the case at bar, however, the injury upon which the action is based was not caused by any defect in the place where the service was to be performed; but it primarily resulted from the negligence of the men who operated the hand car, combined with the carelessness of the man who dropped his tamping bar. This presents the question whether, in view of the fact that plaintiff and his fellow workmen were seen by the bridge carpenters in sufficient time to have avoided the injury, and considering that plaintiff knew that these employees would pass over the line that morning, there was a breach of the master's duty in failing to place a signal, or to adopt some other means to protect the men at work on the track against accidents which might be caused by the negligence of those who operated hand cars. Signal flags are used by the company to notify the persons in charge of its locomotives that the roadbed or track is in a dangerous condition, requiring them to stop their engines, or admonishing them to proceed with care; and, to accomplish the object for which these tokens are designed, prudence dictates that they should be placed at such a reasonable distance from the point of peril as to enable the engineer and those associated with him to get such control of its train as to be able to stop it or slacken its speed before reaching the defect which renders further progress dangerous. The chief purpose which these danger signals serve must necessarily be to protect the lives of those who operate, or are passengers on, the

train, which, by reason of its great weight and rapid movement, creates such momentum that it cannot be checked at once, so as to permit the persons who are riding thereon to safely leave it in time to escape injury. A hand car, however, is of little weight, and can ordinarily be stopped much more easily than a train; hence it would seem, since the *quantum* of duty is always commensurate with the degree of danger, that the necessity for using signals to protect the lives of persons who ride on hand cars is not so urgent as in case of employees and passengers on a swiftly-moving train. It is the servant whose time and attention are so much occupied in the management of dangerous instrumentalities, as a means of advancing the master's business, that he cannot investigate for himself the condition of the place in which his service is performed, who is entitled to special notice of any defect therein that would tend to render it dangerous, but the rule can have no application to an employee of age and experience, who is not hurried in his work, or is as conscious of the danger to which he is exposed as the master can possibly be; and, hence, the reason failing, the servant who works on the track is not entitled to the same degree of consideration as those who are compelled to perform their duties under greater difficulties.

Persons employed in repairing a railroad track can leave it at pleasure in most instances, but not so with a train which must hurriedly pass over the line at frequent intervals, to accommodate the public; hence the duty of yielding the track must devolve upon the section men, who are required to watch the approach of trains: *Larson v. St. Paul, etc. Ry. Co.*, 43 Minn. 423 (45 N. W. 722). The necessity for vigilance on the part of the section man does not relieve the employees in charge of the train from all obligation to be watchful on his ac-

count; for, as was said by Mr. Justice FLY in *International, etc. R. R. Co. v. Arias* (Tex. Civ. App.), 30 S. W. 446: "There is a reciprocal duty existing between the railroad company and the employee at work on the track—the one being that the railroad company must give signals, where the nature of the locality requires, and, in case there is danger of injuring the employee, to use diligence to prevent it; and the other being that the employee must keep an outlook, and seek safety from trains that may be passing." The rule announced in that case, which seems reasonable, would require the engineer to blow his whistle at curves, cuts, and other dangerous places on the line, to notify persons working thereon of the approach of the train, and, in proportion to the degree of danger, it is quite probable that those who operate a hand car should be required to give some notice of its approach, where a view of the track is obscured; but, this obligation not being within the class of duties which are enjoined upon the master, when a railroad company has adopted and promulgated rules for the protection of its employees under such circumstances, any failure to comply therewith is the negligence of a fellow servant—a risk which the employee assumes when he enters upon the service.

Under the rule that the master must exercise reasonable care to furnish a safe place in which the servant performs his labor, the employees who operate trains are entitled to notice by the master of any defect in the roadbed or track which could be discovered by reasonable diligence, but this rule cannot be invoked with like reason in favor of an employee who works on the track, for to give it that effect would tend to render it unnecessary for him to exercise any vigilance to discover the approach of trains; and hence, in our judgment, so far as the plaintiff is concerned, the defendant was not neg-

ligent in failing to set out a danger signal towards Sheridan, as a warning to the men who operated the hand car. We are led to this conclusion for the following reasons: (1) The track was not dangerous. The condition of the place in which the service is to be performed, which renders it dangerous, must be some defect in the soil itself, or in a structure which rests thereon, or is in some manner attached thereto. (2) Plaintiff was aware of the danger. He knew that a hand car would pass over the road, coming from Sheridan, at about the time it arrived,—but the reason he assigns for not perceiving it is that the car came up behind him while his attention was engrossed in the work upon which he was engaged, and the noise made by the use of the tamping bars and other tools in surfacing the track so overcame the sound made by the car that he did not see or hear it in time to avoid the accident,—which must render the excuse unavailing. (3) Plaintiff assumed the risk which caused the injury. While he had been in defendant's employ but a few days, he was nevertheless an experienced section man, accustomed to the work, and conscious of the dangers to which he was constantly exposed; and these risks he voluntarily assumed when he entered the service. One of the hazards to which he was necessarily subjected, and which his employment and service signify he was willing to bear, was the negligence of his fellow servants: 2 Thompson, Neg. p. 969; *Miller v. Southern Pac. Co.*, 20 Or. 285 (26 Pac. 70); *Stockmeyer v. Reed*, 55 Fed. 259; *Lindvall v. Woods*, 41 Minn. 212 (42 N. W. 1020, 4 L. R. A. 793); *Crispin v. Babbitt*, 81 N. Y. 516 (37 Am. Rep. 521); *Slater v. Jewett*, 85 N. Y. 61 (39 Am. Rep. 627); *Hussey v. Cogger*, 112 N. Y. 614 (3 L. R. A. 559, 8 Am. St. Rep. 787, 20 N. E. 556); *Dube v. City of Lewiston*, 83 Me. 211 (22 Atl. 112).

Judge Thompson, in his work on Negligence (Vol. 2, p. 1026), in defining the term "fellow servant," says "that all who serve the same master, work under the same control, derive authority and compensation from the same common source, and are engaged in the same general business, though it may be in different grades or departments of it, are fellow servants, who take the risk of each other's negligence." Under this definition, plaintiff and the men operating the hand car, as well as the overseer in charge of the surfacing gang, who tried to give warning of the approach of the car, but was unheard by plaintiff, were fellow servants; and this is also true when tested by the rule adopted by this court, that the character of the act, rather than the grade of the offending employee, determines such relation: *Anderson v. Bennett*, 16 Or. 515 (19 Pac. 765); *Hartwig v. North Pacific Lumber Co.*, 19 Or. 522 (25 Pac. 358); *Miller v. Southern Pacific Co.*, 20 Or. 285 (26 Pac. 70); *Carlson v. Oregon Short Line Ry. Co.*, 21 Or. 450 (28 Pac. 497); *Fisher v. Oregon Short Line Ry. Co.*, 22 Or. 533 (30 Pac. 425, 16 L. R. A. 519; *Mast v. Kern*, 34 Or. 247 (54 Pac. 950).

Plaintiff's failure to exercise watchfulness, combined with the negligence of his fellow servants, produced his injury; and, these being causes for which the defendant was not responsible, it follows that the judgment is reversed, and the cause remanded for such further proceedings as may be necessary, not inconsistent with this opinion.

REVERSED.

Argued 27 December, 1898; decided 16 January, 1899.

SETON v. HOYT.

[43 L. R. A. 684; 55 Pac. 967.]

1. **COUNTIES—LIABILITY FOR INTEREST.**—A county is only an arm or agent of the state, and consequently is not liable for interest under a general statute regulating that subject, but only when expressly named, so that a county is not liable for interest under Section 3587, Hill's Ann. Laws, it not being mentioned therein.
2. **INTEREST ON CONTRACTS.**—Contracts stipulating for interest will draw interest at the agreed rate, or the statutory rate prevailing at the date of the instrument, until final payment, without regard to any intermediate change in the law.
3. **INTEREST ON COUNTY ORDERS—IMPLIED CONTRACT.**—Under Hill's Ann. Laws, § 2465, providing that the county treasurer shall pay all orders of the county clerk when presented, if there is money in the treasury for that purpose, but if not, he shall indorse thereon, "Not paid for want of funds," which shall entitle such order thenceforth to draw legal interest, two implied contracts are engendered, viz.: that the holder of the order will wait for payment until sufficient money has been accumulated in the usual course of public business to pay the claim, and that the county will pay the legal rate of interest upon the order.
4. **RATE OF INTEREST ON COUNTY ORDERS.***—The rate of interest on county warrants indorsed "Not paid for want of funds" is the rate prevailing at the date of such indorsement, and cannot afterward be reduced.
5. **IMPAIRING OBLIGATION OF CONTRACT—COUNTY ORDER.**—The implied contract to pay interest arising from the nonpayment and indorsement of a county order is protected against impairment by Article I, Section 10, of the United States Constitution.
6. **CONSTRUCTION OF STATUTE.**—It is a general rule that laws are to be considered as prospective and not retrospective in their application unless the contrary clearly appears from the act and the surrounding circumstances.
7. **IDEM.**—Act of October 14, 1898, changing the rate of interest, is not extended to outstanding warrants by the provision that, "Inasmuch as the counties * * * are paying interest on their county warrants at the rate of eight per cent. per annum, thereby imposing a useless burden upon the taxpayers, this act shall become a law upon receiving the signature of the Governor."

From Multnomah: ALFRED F. SEARS JR., Judge.

*NOTE.—A precisely similar case is *Union Savings Bank v. Gelbach* (Wash.), 24 L. R. A. 359.

The question of the right to change the rate of interest on a judgment is considered in a note to *Rockwell v. Buller*, 17 L. R. A. at p. 612, in a note on whether a judgment is a contract.—REPORTER.

34	266
34	305
34	308
34	266
35	481
34	266
36	175
34	266
40	597
34	266
48	312
48	512

Mandamus by Waldemar Seton against Ralph W. Hoyt, county treasurer, to compel payment of interest on a county warrant at the rate fixed by statute when the claim accrued, the treasurer having reduced the rate when a new statute went into force, whereby the legal interest was changed from eight to six per cent. The writ was made peremptory, and defendant appealed.

AFFIRMED.

For appellant there was an oral argument by *Mr. Roscoe R. Giltner*, with a brief over the names of *Russell E. Sewell*, District Attorney, and *Roscoe R. Giltner*, to this effect :

The state guarantees to pay the legal interest on all orders, from the date of their presentment and indorsement ; but it does not agree to pay on these particular orders, or any order, any specified rate of interest so as to make it a part of the obligation of the contract ; but inasmuch as the order is received, payable at the legal rate of interest established by the legislature, there is an implied reservation in the contract as made (if it is a contract) that he shall receive such rate of interest on the obligation as the wisdom of the legislature and public policy may dictate.

The holder takes it with notice that public policy may demand a change in the legal rate of interest which from time to time may be in force during the existence of the obligation to pay. We consider the case at bar analogous to cases in regard to the liability of sureties on official undertakings, where new duties are imposed upon public officers without thereby relieving the surety ; we submit that the interest allowed on a county warrant or order is given by way of a penalty or damages for the delay in payment of the money due upon the debt, and that the legislature has the power to vary this at any time.

We claim that the phrase "thenceforth draw legal interest" of the law, as amended in 1893 (Session Laws, 1893, p. 59), regulating the rate of interest on county orders, in the light of the law itself, contemplates and is notice to a person purchasing one of those orders, that the rate of interest on the order varies as the legal rate is changed by legislation: *Stark v. Olney*, 3 Or. 90; *People v. Vilas*, 36 N. Y. 459; *Chadwick v. United States*, 3 Fed. 750; *Kruttshmitt v. Hauck*, 6 Nev. 163; *Board of Education v. Quick*, 99 N. Y. 138; *Dawson v. State*, 38 Ohio St. 1; *Morley v. Lake Shore Ry. Co.*, 146 U. S. 162. Dissenting opinion of HOYT, J., in *Union Sav. Bank v. Gelbach*, 8 Wash. 502 (24 L. R. A. 359).

A county order is not a contract to pay money; it is nothing more than an order by the officers of one branch of the county on another of its officers to pay money to a third person; it contains none of the elements of a contract: *Allison v. Quinata County*, 50 Pa. St. 351; *Dyer v. Covington Township*, 7 Harris, 200.

A county is not liable to pay interest upon a county order: *Madison County v. Bartlett*, 1 Scannon (Ill.), 67.

For respondent there was an oral argument and a brief by *Mr. William A. Cleland*, to this effect:

The warrants are a legal and valid claim against Multnomah County. They become non-negotiable promissory notes, or contracts of Multnomah County: *Frankl v. Bailey*, 33 Or. 285.

Where the right to interest is based upon contract, either expressed or implied, if allowed by the statute then in force, it cannot be impaired by subsequent legislation declaring their true intent and meaning. Such legislation can only apply to future transactions: *Koshkonong v. Burton*, 104 U. S. 668, 26 L. ed. 886.

The constitution makes no distinction between express and implied contracts: *Edwards v. Kearzey*, 96 U. S. 600, 24 L. ed. 796; *Effinger v. Kenney*, 115 U. S. 566, 29 L. ed. 495; *Fisk v. Jefferson Police Jury*, 116 U. S. 131, 29 L. ed. 587.

A warrant is a contract to pay money, and the legal rate in effect at the time enters into the contract as a part thereof, and cannot be affected by a subsequent law reducing the rate: *Union Savings Bank v. Gelbach*, 8 Wash. 497 (24 L. R. A. 359); *State ex rel. v. Bowen*, 11 Wash. 432; *Dillon, Mun. Corp.* §§ 485-487; *Daniel, Neg. Inst.* §§ 427-430.

Where an ordinance provides for interest on warrants upon which payment has been refused by reason of want of funds, the liability of the city is not affected by the repeal of the ordinance: *Scranton v. Hyde Park Gas Co.*, 102 Pa. 382.

The law existing when a contract is made is a part of it: *First National Bank v. Arthur*, 10 Colo. App. 283 (50 Pac. 738).

A statute should not receive such a construction as to make it impair existing rights, create new obligations, or impose new duties in respect of past transactions, unless such plainly appears to be the intention of the legislature: *Sutherland, Stat. Const.* § 464; *Green v. Anderson*, 39 Miss. 359; *Crigler v. Alexander*, 33 Gratt. 674; *Campbell v. Nonpareil Fire-Brick Co.*, 75 Va. 291; *Moon v. Durden*, 2 Exch. 22; *Dash v. Van Kleeck*, 7 Johns. 477 (5 Am. Dec. 291); *Wood v. Oakley*, 11 Paige, 400; *Johnson v. Burrell*, 2 Hill, 238; *Butler v. Palmer*, 1 Hill, 324; *Snyder v. Snyder*, 3 Barb. 621; *Hackley v. Sprague*, 10 Wend. 114; *McMannis v. Butler*, 49 Barb. 176; *Re Protestant Episcopal Public School*, 58 Barb. 161.

Upon a contract which stipulates for interest either at the agreed rate, or, in the absence of an agreed rate, the

rate prescribed by law at the date of the contract, will be the rate recoverable until the payment of the principal sum : *Spencer v. Maxfield*, 16 Wis. 179.

A judgment with interest at the legal rate affirmed by the supreme court is not affected by subsequent legislation reducing the legal rate of interest, unless the statute so declares : *Missouri Pacific Ry. Co. v. Patton* (Tex. Civ. App.), 35 S. W. 477 ; *Butler v. Rockwell*, 17 Colo. 290 (17 L. R. A. 611, 29 Pac. 458.)

Laws should be construed prospectively and not retrospectively, unless the intention clearly appears from the statute : *Bauer Grocery Co. v. Zelle*, 172 Ill. 407 (50 N. E. 238) ; *Robinson v. Rowan*, 3 Ill. 499 ; *Marsh v. Chestnut*, 14 Ill. 223 ; *Deininger v. McConnel*, 41 Ill. 227 ; *Russell Drainage District v. Benson*, 125 Ill. 490.

MR. CHIEF JUSTICE WOLVERTON delivered the opinion.

This is a proceeding by mandamus, the purpose of which is to determine whether the act of October 14, 1898, reducing the legal rate of interest, is operative upon interest-bearing county warrants issued prior to its passage, so as to limit the interest thereon to the present rate from and after said date. The act alluded to changes the prescribed rate of interest from eight to six per centum on all moneys after the same become due ; on judgments and decrees for the payment of money ; on money received to the use of another, and retained beyond a reasonable time without the owner's consent, express or implied, or on money due upon the settlement of matured accounts from the day the balance is ascertained ; on money due or to become due, where there is a contract to pay interest, and no rate specified. It contains an emergency clause reciting "that inasmuch as the counties of the state are paying interest on their county warrants at

the rate of eight per cent. per annum, thereby imposing a useless burden upon the taxpayers, this act shall become a law upon receiving the signature of the Governor." Section 3587, Hill's Ann. Laws, of which this act is amendatory, is an amendment of section 1 of "An act to regulate the rate of interest on money and to prevent and punish usury," approved October 16, 1862 (Laws, 1862, p. 115). The original act contained a provision (section 6) which has been continued in force until the present day (Section 3592, Hill's Ann. Laws) to the effect that it shall not be construed so as to affect or change the rate of interest to be received by virtue of any contract entered into prior to its becoming a law. Section 2465, Hill's Ann. Laws, as amended (Laws 1893, p. 59), relating to the duties of the county treasurer, provides, among other things, that "He shall pay all orders of the county clerk when presented, if there be money in the treasury for that purpose, and write on the face of such order the date of redemption and his signature. If there be no funds to pay such order when presented, he shall endorse thereon 'Not paid for want of funds,' and the date of such presentment, over his signature, which shall entitle such order thenceforth to draw legal interest; *provided*, that such interest shall cease from the date of notice by publication," etc. By section 2467 county orders are redeemable by the county treasurer according to the time of presentment, but it is further provided that such orders as are payable out of the county revenue shall be received in payment of county taxes without regard to priority of presentment, but that the treasurer shall not pay any balance thereon over and above such tax, when there are outstanding orders unpaid for want of funds. These are the only provisions of the statute which have any bearing upon the case in hand.

1. Defendant's theory touching the controversy embodies three principal contentions : First, that the county is but an arm or agent of the state, and that the sovereign is not required to pay interest, except when self-imposed ; second, that a county order is not a contract between the county and the holder ; and, third, that interest, when demandable under the statute, except when due upon an express contract for its payment, is in the nature of a penalty or damages for the detention of money due and unpaid, and, therefore, that it constitutes a part of the remedy in the enforcement of the demand, which may be modified, or even repealed altogether, by subsequent legislation, without impairment of any contractual relations. In our view of the case, we do not conceive the second proposition to be important or essential to the determination of the cause. As to the first, we are in accord with the contention of counsel, but as to the last we cannot give it our approval. There is some conflict in the authorities upon the question whether a sovereign state is required to pay interest unless self-imposed, but the weight thereof seems to support the contention that it is not. The Supreme Court of the United States has adopted the rule that interest is not allowable on claims against the government, whether they originate in contract or tort, or arise in the ordinary business of administration, or under private acts for relief, passed by congress on special application. But it recognizes the existence of two well established exceptions—one wherein the government has stipulated to pay interest, and the other where interest is given by act of congress either expressly as such, or under the name of damages : *United States v. Bayard*, 127 U. S. 251 (8 Sup. Ct. 1156). In a subsequent case of *United States v. North Carolina*, 136 U. S. 211 (10 Sup. Ct. 920), Mr. Justice GRAY says : "Interest, when not stipulated for by con-

tract, or authorized by statute, is allowed by the courts as damages for the detention of money, or of property, or of compensation, to which the plaintiff is entitled; and, as has been settled upon grounds of public convenience, is not to be awarded against a sovereign government, unless its consent to pay interest has been manifested by an act of the legislature, or by a lawful contract of the executive officers." The rule applies as well to a sovereign state as to the national government. Nor is the state within the purview of a general law regulating the rate of interest upon money due or to become due, and this goes upon the ground that a sovereign is not bound by the words of a statute unless it is expressly named: *State ex rel. v. Board of Public Works*, 36 Ohio St. 409; *Carr v. State*, 127 Ind. 204 (11 L. R. A. 370, 26 N. E. 778); *Attorney-General v. Cape Fear Nav. Co.*, 37 N. C. (2 Ired. Eq.) 444; *Bledsoe v. State*, 64 N. C. 392; *Town of Mt. Morris v. Williams*, 38 Ill. App. 401; *Madison County v. Bartlett*, 2 Ill. (1 Scam.) 67. That the county is but the agent or instrumentality of the state, constituted and employed essentially for the promotion of its general government, and, therefore, subject to like rules and restrictions governing its liabilities as the state, there can be no controversy: 1 Dillon, Mun. Corp., § 23. We take it, therefore, that a county is not liable for the payment of interest under the general provisions of the statute regulating the rate upon the demands enumerated in said section 3587 as an individual would be where there is no contract to pay interest.

As a general rule, it may be conceded that where the demand falls within the purview of the statute, and by reason thereof is subject to an interest charge at the legal rate, the rate upon the demand will vary as the law fixing it may be changed or varied by the legisla-

ture during the life of the demand. The reason of the rule is that the person from whom the money is retained or withheld is entitled to an indemnity for the loss which he sustains on account of being deprived of its use, and it is assumed that the legal rate of interest for the time of the withholding is a fair measure of damages by which to determine such loss, in the absence of any other method of arriving at the exact or precise loss actually incurred : *State v. Guenther*, 87 Wis. 673 (58 N. W. 1105); *Wilson v. Cobb*, 31 N. J. Eq. 91; *White v. Lyons*, 42 Cal. 279; *Mayor, etc. v. O'Callaghan*, 41 N. J. Law, 349.

Where there is an agreement to pay interest upon an obligation at a stipulated rate to a day certain—as, for instance, at maturity—and there is no engagement touching the rate the obligation shall subsequently bear, the authorities are in hopeless conflict as regards the rate of interest recoverable upon the deferred payment. They divide accordingly as it has become the settled policy of the courts touching the nature of the indemnity recoverable for the detention of the money beyond the day upon which it has fallen due and payable. Upon the one hand, it is held that such indemnity is purely a matter of damages, not in the least referable to the contract, although for breach thereof; and that the proper and appropriate measure of such damages is the rate of interest which the law has prescribed. Upon the other, it is considered that, while the indemnity is recoverable as damages, yet the rate of interest which should be allowed is rather to be implied from the terms of the contract touching it prior to the maturity of the obligation. The idea is clearly expressed by Lord SELBORNE in *Cook v. Fowler*, L. R. 7 H. L. 27. He says: “Although, in cases of this class, interest for the delay of payment *post diem* ought to be given, it is on the principle, not of implied contract, but of damages

for breach of contract. The rate of interest to which the parties have agreed during the term of their contract may well be adopted, in an ordinary case of this kind, by a court or jury, as a proper measure of damages for the subsequent delay; but that is because, ordinarily, a reasonable and usual rate of interest, which it may be presumed would have been the same whatever might be the duration of the loan, has been agreed to:" *Price v. Railway Co.*, 16 Mees. & W. 244; *Morgan v. Jones*, 8 Welsb. H. & G. 620; *Keene v. Keene*, 3 C. B. (N. S.) 144—support this principle. Mr. Justice GRAY, while Chief Justice of the Supreme Court of Massachusetts, by a most exhaustive and learned opinion, in which he has collated and reviewed all the authorities pro and con, came to the conclusion expressed by the following language: "When a written engagement is made, as authorized by the statute, to pay a greater rate of interest yearly than six per cent., the intention of the contract and the effect of the statute appear to us to be that the creditor shall receive the stipulated rate of interest so long as the debtor has the use of the principal; and that, in an action upon the contract, the creditor shall recover interest at that rate, not merely until the time when the principal is agreed to be paid to him, but until it is actually paid, or his claim for principal and interest judicially established." Later he denotes the principal upon which it rests. He says: "The interest after the breach of the contract, though not strictly recoverable as part of the debt, but rather as damages, is ordinarily to be measured, according to the intention manifested by the contract, by the standard thereby established:" *Union Inst. for Savings v. City of Boston*, 129 Mass. 82 (37 Am. Rep. 305). See, also, *Brannon v. Hursell*, 112 Mass. 63.

2. Although the Supreme Court of the United States is

committed to the other view, yet it is there held that the question is one of local law. Mr. Justice FIELD, in *Cromwell v. Sac County*, 96 U. S. 51, after holding, in accord with the Iowa courts, that contracts drawing a specified rate of interest before maturity draw the same rate afterwards, and citing other authorities in support of the rule, says: "There are, however, conflicting decisions; but the preponderance of opinion is in favor of the doctrine that the stipulated rate of interest attends the contract until it is merged in the judgment." Without further citation of authorities, we may say that the later tendency of the courts is in favor of the rule as announced in *Union Inst. for Savings v. City of Boston*, 129 Mass. 82 (37 Am. Rep. 305), and *Shaw v. Rigby*, 84 Ind. 375 (43 Am. Rep. 96, 27 Alb. Law J. 154); and it is the one which appeals most strongly to our judgment. In consonance with this view it is said in *State v. Guenther*, 87 Wis. 673, that "on a contract which stipulates for interest, interest at the agreed rate, or, in the absence of an agreed rate, at the rate prescribed by the law at the date of the contract, will be the rate recoverable until the repayment of the principal sum. A change of the legal rate would not affect the rate of interest recoverable upon such a contract,"—citing *Spencer v. Maxfield*, 16 Wis. 178. So it was held in *Pruyn v. City of Milwaukee*, 18 Wis. 386, that city bonds conditioned for the payment of the principal at a specified day, with interest above the legal rate, continued to draw the stipulated rate after maturity. And EARL, J., in *O'Brien v. Young*, 95 N. Y. 428 (47 Am. Rep. 64) states the rule to be that "where one contracts to pay money on demand 'with interest,' or to pay money generally 'with interest,' without specifying time of payment, the statutory rate then existing becomes the contract, and must govern until payment, or at least until demand and actual default, as the parties

must have so intended." In support of this proposition, see, also, *Paine v. Caswell*, 68 Me. 80 (28 Am. Rep. 21).

3. With this discussion of the rules of law that obtain relating to the recovery of interest upon agreements for its payment, we are now prepared to consider the effect of the county treasurer's indorsement, "Not paid for want of funds," upon a county order or warrant under the law which requires payment of interest thereon after such indorsement at the legal rate. It is contended by counsel for the plaintiff, contrary to defendant's position, that the order or warrant is itself a contract; but with this we have little concern. It is sufficient if the obligation which the law imposes upon the county, where the parties have dealt with it upon the faith of such obligation, constitutes a contract for the payment of the legal rate of interest obtaining at the time of the indorsement. The order or warrant itself has at least the force of an audited demand against the county, and *prima facie* will support an action which may be instituted upon it to establish the same by judgment: *Goldsmith v. Baker City*, 31 Or. 249 (49 Pac. 973). People deal with the county upon the understanding that under the law their audited demands, evidenced by orders received from the clerk, will be paid on presentation to the treasurer, or, in case of lack of funds, indorsed so as to entitle them thenceforth to draw interest at the legal rate. They must also understand that the indorsed orders can only be redeemed by the county treasurer according to the priority of their presentment and indorsement. And thus it is that the time for payment is, from the nature of things, indefinite, depending entirely upon the state of the county treasury. This understanding the Supreme Court of Nebraska has characterized as an implied agreement on the part of the person dealing with the county that he shall wait until money is made

available by the ordinary mode of collecting revenues, and in the usual course of the county's business: *Brewer v. Otoe County*, 1 Neb. 373. This case is cited as authoritative in *Chapman v. Douglas County*, 107 U. S. 348 (2 Sup. Ct. 62). Now, if there is an implied agreement on the part of the holder of the warrant to abide the accumulation of funds in the ordinary course with which to meet the demand, the converse ought to be, and undoubtedly is, true, that there is an implied, if not an express, agreement, engendered by operation of law and the transaction of public business, which must be in conformity with its requirements, that the county will pay the legal rate of interest upon the indorsed county order. So that here is, in effect, an agreement or contract upon the part of the county to pay the legal rate of interest.

4. But it is argued, admitting a contract to exist to this extent, that the agreement is to pay only the legal rate as it may be established from time to time by the legislature, and that the contract was made with reference to the variable rate, and not solely with reference to that which prevailed at the date of the indorsement. In this we cannot concur, for, if we apply the general rule of law that where a person contracts for the payment of a definite rate of interest to a day certain, or contracts for the payment of interest without naming the rate, interest is recoverable in the one instance at the agreed rate after the day named, and in the other at the legal rate until judgment, we have a clear case of the right of the holder of the indorsed order or warrant to recover from the county interest at the rate prevailing at the date of the indorsement to the time of its payment by the treasurer; and such we believe to be the law governing the transaction. It is well understood that the county cannot be coerced into making payment, and the warrant holder, although he may

sue upon his warrant, and obtain judgment against the county, which would entitle him to another order or warrant in lieu of the judgment, yet he must abide his time, and await the accumulation of funds whereby to discharge the obligation in accordance with his implied agreement. And it would be unjust and inequitable if the other party to the contract, being an agency of the state, could, through the legislature, abolish or reduce interest to a nominal rate, and thus leave the party remediless for the recovery of any compensation for loss sustained by reason of delayed payment of his demand.

5. The constitutional provision against the impairment of contracts is not limited in its scope and purpose to express contracts and specific agreements, but extends as well to "that much larger class," says Mr. Justice MILLER in *Fisk v. Jefferson Police Jury*, 116 U. S. 131 (6 Sup. Ct. 329), "in which one party having delivered property, paid money, rendered service, or suffered loss, at the request or for the use of another, the law completes the contract by implying an obligation on the part of the latter to make compensation. This obligation can no more be impaired by a law of the state than that arising on a promissory note." See, also, 2 Story, Const. § 1377.

6. Even in the absence of a constitutional inhibition to a retrospective operation of legislative enactments, it is a general rule that a statute was intended to operate prospectively only, unless a purpose to give it a retrospective force is declared by clear and positive command, or is to be inferred by necessary and unavoidable implication from the language of the act, taken in its appropriate signification, and construed in connection with the subject-matter and the occasion of the enactment, admitting of no reasonable doubt, but precluding all question as to such intention: Endlich, Interp. Stat.

§ 271; *Lesseps v. Wicks*, 12 La. Ann. 739; *People ex rel. v. Board of Supervisors*, 70 N. Y. 228; *Chew Heong v. United States*, 112 U. S. 536 (5 Sup. Ct. 255); *Bay v. Gage*, 36 Barb. 447; *Bauer Grocer Co. v. Zelle*, 172 Ill. 407 (50 N. E. 238).

7. Nor does the emergency clause inserted in the amendatory act indicate an intention upon the part of the legislature to extend its regulations to outstanding county orders or warrants, but, when considered in a prospective sense, under the rule which governs unless the intention otherwise clearly appears, the construction of the act in question is obvious, and its application clear. In *Koshkonong v. Burton*, 104 U. S. 668, the question was involved whether the holders of certain municipal bonds were entitled to interest upon coupons thereto attached, after their maturity, they not having been paid at the date stipulated therefor. It appears that the state courts of Wisconsin had construed the statute in force at the time of the issuance of such bonds as in harmony with the allowance of such interest. Thereafter the legislature, by direct enactment, attempted to place the opposite construction upon such statute, but it was held that the later enactment impaired the implied obligation of the municipality to pay interest upon interest as the law stood under the construction of the state courts, and that such interest was recoverable, notwithstanding the later act. *Union Sav. Bank v. Gelbach*, 8 Wash. 497 (24 L. R. A. 359, 36 Pac. 467), is parallel with the case at bar, and it was there held, but upon reasoning different from that which seems to us to be more in harmony with the legal conditions which prevail and surround the transaction, that a change in the legal rate of interest by legislative enactment did not affect the rate theretofore payable upon warrants issued prior to the date when the new enactment became operative. This case was followed in

Williams v. Shoudy, 12 Wash. 362 (41 Pac. 169), wherein it is said: "The right of a holder of a warrant legally issued to interest (after proper presentment and indorsement made) is as fixed and certain in law as the right to demand payment of the principal." See, also, *State ex rel. v. Bowen*, 11 Wash. 432 (39 Pac. 648); *City of Scranton v. Hyde Park Gas Co.*, 102 Pa. St. 382; *Missouri Pacific Ry. Co. v. Patton* (Tex. Civ. App.) 35 S. W. 477; *First Nat. Bank v. Arthur*, 10 Colo. App. 283 (50 Pac. 738); *Butler v. Rockwell*, 17 Colo. 290 (17 L. R. A. 611, 29 Pac. 458); *Murdock v. Franklin Ins. Co.*, 33 W. Va. 407 (10 S. E. 777, 7 L. R. A. 572); *Marks v. Trustees*, 37 Ind. 155.

Upon these principles and authorities we are constrained to affirm the judgment of the court below. We have reached the conclusion after much deliberation, and believe it to be in harmony with justice and fair dealing. The other view would lead, under the system adopted for the transaction of county business and the manner of payment of the orders or warrants of the county, to a practical repudiation of a material portion of the county's obligations. In the present case the county has become obligated by positive enactment to pay the legal rate. Parties have dealt with it upon that understanding, and when claims duly audited, which have accrued in course of business transactions with the county, are presented, and indorsed, "Not paid for want of funds," the law reads into the transaction a contract to pay interest thenceforth upon the warrant, and the measure of recovery for delay in payment is the then existing rate of interest until paid, and subsequent legislation cannot affect or impair the obligation.

AFFIRMED.

Decided 16 January, 1899; rehearing denied.

ESBERG CIGAR CO. v. CITY OF PORTLAND.

[43 L. R. A. 445, 55 Pac. 961.]

1. **MUNICIPAL WATER WORKS—LIABILITY FOR NEGLIGENCE.***—A system of water works operated for profit by a city belongs to the municipality in its private rather than in its public or governmental character, and the city is liable as a private proprietor would be for the negligent construction or maintenance thereof.
2. **IDEM.**—The appointment of the water committee of a city by the legislature, and the fact that it is independent of the control of any other department of the municipal government, will not relieve the city from liability for injuries caused by its negligence in the construction or maintenance of the city water works.
3. **MUNICIPAL AGENTS—RESPONDEAT SUPERIOR.**—By adopting a charter providing for the construction of water works, and for a committee to operate the system when complete, the people of a city make such committee the agent of the municipality, for whose negligence it must answer, under the doctrine of *respondet superior*.
4. **RESPONSIBILITY FOR ACTS OF MUNICIPAL AGENTS.**—The responsibility of a city for the acts of its officers or agents does not depend upon the manner of their appointment, but upon the character of their duties: if these are political or governmental, the city is not liable for their negligence; but if the duties concern what may be called the private affairs of the corporation, it is liable.
5. **EVIDENCE OF NEGLIGENCE.**—Evidence that a certain water main had burst three times, including the occasion complained of, each time under an ordinary pressure, coupled with testimony that water pipe of that size and thickness will not ordinarily break under such circumstances, if properly constructed and laid, is sufficient to carry the case to the jury on the question of negligence in the construction of the pipe.

*NOTE.—In 30 Am. St. Rep., at pp. 376-413, is a monographic note discussing the Liability of Cities for the Negligence and Other Misconduct of Their Officers and Agents. See, also, *O'Rourke v. City of Sioux Falls*, 46 Am. St. Rep. 765, 19 L. R. A. 789.

A very complete collection of the authorities on the Liability of Municipal Corporations for Property Destroyed by a Mob, is published with the case of *Gianfortone v. New Orleans*, 24 L. R. A. 592. See, also, *New Orleans v. Abbagnato*, 62 Fed. 240 (26 L. R. A. 329).—REPORTER.

34	282
34	306

34	282
40	130
40	391

34	282
48	439n

6. INFERENCE OF NEGLIGENCE.*—The mere happening of an accident causing injury justifies an inference of negligence when the cause of the injury is under the control of the defendant, and the accident is such as in the ordinary course of things does not happen if proper care is used in the management.

From Multnomah: ALFRED SEARS JR., Judge.

This is an action by the Esberg-Gunst Cigar Company against the City of Portland, to recover damages for an injury to plaintiff's goods, caused by the bursting of an alleged negligently defective water main belonging to the defendant city, and the consequent flooding of the cellar in which such goods were stored. In 1885 the charter of the City of Portland was amended by adding thereto an additional chapter (Laws, 1885, p. 97), by which the city was authorized and empowered to construct, or purchase, keep, conduct, and maintain water works therein of a character and capacity sufficient to furnish the city and its inhabitants with water for all uses and purposes necessary for the comfort, convenience, and well-being of the same, and to issue and dispose of its bonds for that purpose: §§ 142, 153. The powers thus given to the city were to be exercised by fifteen resident taxpayers thereof, named in the act, styled collectively "The Water Committee," nine of whom should constitute a quorum, and who were authorized to fill by appointment all vacancies which may occur in their number: §§ 143, 145. This committee was required to organize within a certain time by the election of a chairman and clerk, whose du-

*NOTE.—As to presumptions of negligence from the occurrence of accidents in cases of personal injuries, injuries to livestock by railway trains, and in cases of railway fires, see note to *Barnowski v. Helson*, 15 L. R. A. 33.

The following cases have footnotes on the Inferences of Negligence that may be justified by the Happening of Accidents: *Fleming v. Pittsburgh, etc. Ry.*, 88 Am. St. Rep. 837, 22 L. R. A. 351; *Stearns v. Ontario Spinning Co.*, 68 Am. St. Rep. 808, 30 L. R. A. 842; *Judson v. Giant Powder Co.*, 29 L. R. A. 718, 48 Am. St. Rep. 146; *Haynes v. Raleigh Gas Co.*, 26 L. R. A. 316, 41 Am. St. Rep. 786; *Shafer v. Lucock*, 29 L. R. A. 254; *Philadelphia, etc. R. R. Co. v. Anderson*, 20 Am. St. Rep. 490, 8 L. R. A. 673.—REPORTER.

ties were prescribed by the act (§§ 144, 146-148); to appoint a treasurer, who shall have the care and custody of all moneys received by the committee from the sale of bonds, or otherwise, for the construction or purchase of water works, and shall pay out the same on the order of the chairman, countersigned by the clerk of the committee, and not otherwise (§ 149); to employ and discharge, from time to time, such other agents, workmen, laborers, and servants, at such compensation or wages as it may deem necessary and convenient to the accomplishment of the purposes of the act (§ 151). It is further provided that whenever and as soon as the works provided for in the act are, in the judgment of the committee, ready for use, it shall select from its members, if a sufficient number will consent to serve, and, if not, from the resident taxpayers of the city, five persons for the several terms of two, four, six, eight, and ten years, who shall be styled individually "Water Commissioners," and collectively, "The Water Commission," to which it is required to turn over the water works, and all property appurtenant thereto, together with all books, papers, and accounts relating to the construction or purchase thereof; and thereafter the power and authority given by the act to the city to keep, conduct, and maintain water works shall be exercised by such commission: §§ 154, 155, 157. After The Water Commission has been selected by the committee, as provided in the act, the members of such

- commission shall thereafter be appointed by the Governor of the state from among the resident taxpayers of the city, as vacancies may occur from time to time. The commission is given power (1) to employ, hire, and discharge all such agents, workmen, laborers, and servants as it may deem necessary and convenient in the conduct and management of the water works; (2) to make all needful rules and regulations in reference thereto; (3) to

establish rates for the use and consumption of water by the city and inhabitants thereof, including the people living along the line, or in the vicinity of the works without the city; (4) to provide for the payment of water rates monthly in advance, and to shut off the water from any house, tenement, or place for which the water rate is not duly paid, or when any rule or regulation is disregarded or disobeyed; (5) to do any other act or make any other regulations necessary and convenient for the conduct of its business, and the due execution of the power and authority given it by the act, and not contrary to law: § 159. All money collected or received by the commission for the use and consumption of water, or otherwise, is required to be deposited with the treasurer of the city, who shall keep the same separate and apart from other funds, and pay it out on the order of the chairman of the commission, countersigned by the clerk, and to the holder of any overdue interest coupons of the bonds issued under the provisions of the act, on the presentation and surrender thereof: § 158. It is made the duty of the commission, annually, before the first day of January, to make a written estimate of the probable expense of maintaining and conducting the water works during the ensuing year, and also the cost of any contemplated alteration, improvement, or extension, and thereupon ascertain and prescribe, as nearly as it conveniently can, a water rate for such year that will insure a sufficient income from the sale of water to pay such expense and costs, together with one year's interest on the bonds then issued and outstanding: § 160. And, after the expiration of five years, in fixing the water rates, it is authorized to include in its estimate therefor a sum equal to one per centum on the par value of the bonds then issued and outstanding, which sum shall be collected and invested under the direction of the commission as a sinking fund

for the payment or redemption of such bonds: § 161. Immediately after the act of 1885 became a law, the persons named therein as The Water Committee proceeded to organize as directed, and to issue and dispose of city bonds, from the proceeds of which they purchased, in December, 1886, the plant of the Portland Water Company, a private corporation then engaged in supplying the city and its inhabitants with water for hire, and subsequently commenced to enlarge the works so purchased by the construction of a gravity system, by which water should be taken from Bull Run Creek at a point some miles distant from the city. The act of 1885 was, in substance, incorporated in the latter act (Laws, 1891, p. 796), providing for the consolidation of the cities of Portland, East Portland, and Albina, which went into effect in July, 1891, after having been accepted by a majority of the legal voters of the several cities interested, at an election held for the purpose in June, 1891, and is also contained in the subsequent charter of 1893 (Laws, 1893, p. 810). During the process of enlarging the works, The Water Committee, during the year 1892, laid a twenty-four-inch main on Fourth Street, and connected it with the other mains comprising the water system. On January 13, 1896, this main burst, and the waters escaping therefrom flooded the streets, and the cellars of the adjoining buildings, including the premises occupied by the plaintiff and used as a tobacco and cigar store, to its damage in the alleged sum of \$2,667.87 Its claim therefor having been rejected by the city, this action was brought, resulting in a judgment of nonsuit, from which the appeal is taken.

REVERSED.

For appellants there was a brief over the name of *Cox, Cotton, Teal & Minor*, with an oral argument by *Mr. Wirt Minor*.

For respondent there was a brief over the names of *Wm. M. Cake*, former City Attorney, and *Fred L. Keenan*, together with a supplemental brief and an oral argument by *Mr. Joel M. Long*, City Attorney, and *Mr. Ralph R. Duniway*.

MR. JUSTICE BEAN, after stating the facts, delivered the opinion of the court.

In support of the judgment it is contended: First, that the water works belong to the city in its public or governmental capacity, and it is therefore not liable to a common-law action for negligence in constructing or maintaining the same; second, that The Water Committee, under whose direction and control they were constructed, and were being maintained at the time of the accident, is an independent body, appointed by the state for public governmental purposes, over which the city has no control, and for whose negligence it is not liable under the common-law doctrine of *respondeat superior*; and, third, that there was not sufficient evidence of negligence given on the trial to carry the case to the jury as a question of fact.

1. There is a well-established distinction made by the authorities between the liability of a municipal corporation for the acts of its servants, agents, officers or employees, done in the exercise of powers and duties granted to or imposed upon it as a mere agency of the state and performed exclusively for public governmental purposes, and acts done in the exercise of powers granted to or privileges conferred for its own profit, advantage and

emolument, although inuring incidentally to the public. This distinction, though a very shadowy one at times, and though much difficulty has been experienced by the courts in determining within which class a particular case should be placed, nevertheless is well settled, and has governed the decision in many cases. It is alluded to by Mr. Justice STRAHAN in *Caspary v. Portland*, 19 Or. 496 (20 Am. St. Rep. 842, 24 Pac. 1036), and is very clearly stated by FOLGER, J., in *Maximilian v. New York*, 62 N. Y. 160, 164 (20 Am. Rep. 468): "There are two kinds of duties which are imposed upon a municipal corporation," he says. "One is of that kind which arises from a grant of a special power, in the exercise of which the municipality is as a legal individual; the other is of that kind which arises, or is implied, from the use of political rights under the general law, in the exercise of which it is as a sovereign. The former power is private, and is used for private purposes; the latter is public, and is used for public purposes. * * *

The former is not held by the municipality as one of the political divisions of the state; the latter is. In the exercise of the former power and under the duty to the public which the acceptance and use of the power involves, a municipality is like a private corporation, and is liable for a failure to use its power well, or for an injury caused by using it badly. But where the power is entrusted to it as one of the political divisions of the state, and is conferred, not for the immediate benefit of the municipality, but as a means to the exercise of the sovereign power for the benefit of all citizens, the corporation is not liable for nonuser, nor for misuser by the public agents." Accordingly, it has been held that municipal corporations are not responsible for the negligence or wrongful acts of health officers or boards of health (*Bryant v. City of St. Paul*, 33 Minn. 289, 23 N.

W. 220, 53 Am. Rep. 3; *Ogg v. Lansing*, 35 Iowa, 495, 14 Am. Rep. 499; *Brown v. Inhabitants of Vinalhaven*, 65 Me. 402, 20 Am. Rep. 709; *Barbour v. City of Ellsworth*, 67 Me. 294); or of employes of the commissioners of public charities and correction (*Maximilian v. Mayor of New York*, 62 N. Y. 160, 20 Am. Rep. 468); or of officers or members of their fire or police departments (*Hafford v. City of New Bedford*, 16 Gray, 297; *New Orleans v. Abbagnato*, 23 U. S. App. 533, 62 Fed. 240, 10 C. C. A. 361, 26 L. R. A. 329; *Fisher v. City of Boston*, 104 Mass. 87, 6 Am. Rep. 196; *Burrill v. City of Augusta*, 78 Me. 118, 58 Am. Rep. 788, 3 Atl. 177; *Wilcox v. City of Chicago*, 107 Ill. 334, 47 Am. Rep. 434; *City of Richmond v. Long*, 17 Gratt. 375, 94 Am. Dec. 461; *Elliott v. City of Philadelphia*, 75 Pa. 347, 15 Am. Rep. 591; *Gillespie v. City of Lincoln*, 35 Neb. 34, 16 L. R. A. 349, 32 N. W. 811; *Calwell v. City of Boone*, 51 Iowa, 687, 33 Am. Rep. 154); nor for the negligent construction, maintenance, or use of appliances for the extinguishment of fires (*Hayes v. Oshkosh*, 33 Wis. 314, 14 Am. Rep. 760; *Springfield Ins. Co. v. Village of Keesville*, 148 N. Y. 46, 30 L. R. A. 660, 51 Am. St. Rep. 667, 42 N. E. 405; *Edgerly v. City of Concord*, 62 N. H. 8, 13 Am. St. Rep. 533; *Tainter v. City of Worcester*, 123 Mass. 311, 25 Am. Rep. 90); or for an injury caused by a negligent defect in a school building (*Ham v. Mayor of New York*, 70 N. Y. 459; *Hill v. City of Boston*, 122 Mass. 344, 23 Am. Rep. 332); or for an injury received by the giving way of the floor of a town house used for holding town meetings and other public purposes (*Eastman v. Meredith*, 36 N. H. 284, 72 Am. Dec. 302).

But when a special power or privilege is conferred upon or granted to a municipal corporation, to be exercised for its own advantage or emolument, and not as a

mere governmental agency, it is liable to the same extent as an individual or a private corporation for negligence in managing or dealing with the property rights or franchises held by it under such grant. Thus if, in repairing a building belonging to the city, and used in part for municipal purposes, and in considerable part also as a source of revenue to the corporation, the agents and servants of the city dig a hole in the ground adjoining, and negligently leave it open and unguarded, so that a person rightfully walking on a path leading by the building, although not a public highway, falls into such hole, and is injured, the city will be liable to an action at common law for the injury: *Oliver v. City of Worcester*, 102 Mass. 489 (3 Am. Rep. 485). So, also, when the city owns a wharf, and receives and charges wharfage for its use, it is bound the same as a private individual to use ordinary care and diligence in keeping it safe and free from obstructions, and is liable in an action at common law for damages done to a vessel by reason of neglect of such duty: (*City of Petersburg v. Applegarth*, 28 Gratt. 321, 26 Am. Rep. 357; *Pittsburgh City v. Grier*, 22 Pa. 54, 60 Am. Dec. 65; *Mersey Docks Board v. Gibbs*, 11 H. L. Cas. 686). In accordance with this distinction, it is quite universally held that when a municipal corporation voluntarily undertakes to construct and maintain water or gas works in pursuance of statutory authority, for the purpose of supplying the inhabitants thereof with water or gas at rates established by the city, it is liable for an injury in consequence of its acts in constructing and maintaining such works, the same as a private corporation or individual. "A municipal corporation, owning water works or gas works which supply private consumers on the payment of tolls," says Mr. Dillon, "is liable for the negligence of

its agents and servants the same as like private proprietors would be." 2 Dillon, Mun. Corp. § 954.

The doctrine is well stated by LEWIS, C. J., in *Western Saving Fund Society v. City of Philadelphia*, 31 Pa. 183 (72 Am. Dec. 730), in speaking of a municipal corporation as the owner of gas works. "The supply of gas light," he says, "is no more a duty of sovereignty than the supply of water. Both these objects may be accomplished through the agency of individuals or private corporations, and in very many instances they are accomplished by those means. If this power is granted to a borough or a city, it is a special private franchise, made as well for the private emolument and advantage of the city as for the public good. The whole investment is the private property of the city, as much so as the lands and houses belonging to it. Blending the two powers in one grant does not destroy the clear and well-settled distinction, and the process of separation is not rendered impossible by the confusion. In separating them, regard must be had to the object of the legislature in conferring them. If granted for public purposes exclusively, they belong to the corporate body in its public, political, or municipal character. But if the grant was for purposes of private advantage and emolument, though the public may derive a common benefit therefrom, the corporation *quoad hoc* is to be regarded as a private company. It stands on the same footing as would any individual or body of persons upon whom the like special franchises had been conferred." To the same effect, see also *Bailey v. Mayor of New York*, 3 Hill, 531 (38 Am. Dec. 669); *Hand v. Brookline*, 126 Mass. 324; *Perkins v. Lawrence*, 136 Mass. 305; *Stoddard v. Winchester*, 157 Mass. 567 (32 N. E. 948); *Aldrich v. Tripp*, 11 R. I. 141 (23 Am. Rep. 434, 19 Am. L. Reg. N. S. 743); *San Francisco Gas Co. v. San Francisco*, 9

Cal. 453; *Scott v. Manchester*, 2 Hurlst. & N. 204; 2 Beach, Pub. Corp. § 1140; and 1 Dillon, Mun. Corp. (3 ed.), § 58. Unless, therefore, there is something in the facts of this case to take it out of the general rule, the liability of the defendant to persons injured by the negligent manner in which the water works in question were constructed or are maintained cannot be questioned.

2. The argument of the defendant on the second point is that, although the works in fact belonged to the city, and were paid for with funds derived from the sale of its bonds, they were built in pursuance of a public duty, involuntarily imposed upon the municipality by express legislative mandate, and therefore are owned and controlled by the city as a public or governmental agency, and not in its private or proprietary capacity; and also that the committee under whose direction and supervision the works were constructed and are now operated and maintained is an independent body appointed by and acting as an agent of the state, over which the city has no control, and for whose negligence it is not responsible. In support of the position that the works belong to the city in its public, as distinguished from its private, capacity, reliance is had principally upon the decision of this court in *David v. Portland Water Committee*, 14 Or. 98 (12 Pac. 174). That was a suit brought by a resident and taxpayer to restrain the water committee named in the act of 1885 from issuing and disposing of the bonds of the municipality, and constructing water works in pursuance of such act, on the ground that it was unconstitutional and void, and would unlawfully impose a burden upon the taxpayers of the city. The only ruling in that case which has any bearing upon the question now before us was that, under the circumstances, the supplying of the City of Portland and its inhabitants with water which had to be brought

by means of pipes from some place outside of the city was not so essentially a private purpose that the legislature could not constitutionally appoint the agents of the city for the construction of such works. But it does not follow from this view that the works when constructed would not belong to the city in its private or corporate capacity. Indeed, the entire reasoning of the opinion permits the clear inference, it seems to us, that the court never lost sight of the fact that they would be the property of the city, but, notwithstanding this, concluded that the object sought to be accomplished was so impressed with a public purpose that the determination of the legislature as to the necessity for such an enterprise, and its selection of the agents of the city by whom the work should be undertaken, was valid, and conclusive upon the courts. The act authorizing the construction of the works and appointing the committee to have control thereof became a part of the charter of the city. Under it the city alone was authorized and empowered to construct and maintain them. The money therefor was to be raised by the sale of its bonds, and the court expressly held in the *David Case* that the members of The Water Committee were "no more than agents of the city required by the act to carry out its provisions," and should not be regarded as officers. So we conclude that there is nothing in the doctrine of that case to exempt the City of Portland from the general rule which applies to all municipal corporations owning and operating water works for the purpose of supplying its inhabitants with water for hire on the theory that the works are owned by it in its public or governmental, as distinguished from its private, capacity.

3. Nor do we concur in the position that the city is not liable for the negligent acts of The Water Committee and its servants and employees under the doctrine of

respondeat superior. It is true, this doctrine is grounded upon the right of an employer to select his servants, and discharge them if careless, unskillful, or incompetent, and to direct and control them while in his employ. But, whatever may have been the legal relation of The Water Committee to the city prior to the consolidation act of 1891, it is clear that thereafter it became as much the agent or representative of the municipality, within the scope of the powers conferred upon it, as any other officer or agent provided for in the charter. When the people of the cities of Portland, East Portland, and Albina by popular vote accepted the charter of 1891, containing, in substance, the same provisions as the act of 1885 creating and naming the Water Committee, and vesting in it and a commission thereafter to be appointed the power to construct, manage, and control the water system belonging to the city, they must be deemed to have thus accepted such committee and commission as their agents to carry out the work. By the terms of the charter, the water committee and commission are made agents or representatives of the municipality as much as the mayor, common council, or any other officer provided for therein. Each of these officers or agents is charged with the performance of certain municipal duties, and it takes all of them to constitute the corporation. The inhabitants within certain described territory were, by the act of 1891, created a municipal corporation, with certain defined rights, powers, privileges, and duties, to be exercised by agents and officers provided for in the act of incorporation. And it cannot be said that one of the officers thus provided for is any more the agent or representative of the municipality than the other. Nor is the manner of their appointment, if valid, of any consequence in determining their representative capacity. The legislature, in the exercise of its plenary powers over muni-

cipal corporations, thought best to provide that certain powers which it granted to the City of Portland should be exercised by officers and agents of its own selection. This legislation was held valid in *David v. Portland Water Committee*, 14 Or. 98 (12 Pac. 174), but it does not make the agent so selected any the less the representative of the municipality. The power and authority given to The Water Committee by the charter is not, as counsel seem to think, exclusive of the city, but only exclusive of any other agent or officer of the city. The right and power to construct and maintain water works is expressly vested in the municipality. Its exercise is devolved by the charter upon The Water Committee. But this is a duty which they discharge, not for themselves, nor for the public generally, but for the city.

4. As said by EARL, J., in *Ehrgott v. New York*, 96 N. Y. 264 (48 Am. Rep. 622), in discussing the liability of a city for an injury received in consequence of a defective street which was under the exclusive control of a commission whose duties were prescribed and defined by the charter: "The city must act through officers and agents, and it is for the legislature to determine what powers and duties shall be devolved upon them. It matters not how ample or exclusive their powers may be, nor how independently they may act, nor how they are chosen. If they are provided by law, and authorized to discharge a corporate duty which rests upon the municipality, then, in the discharge of that duty, they represent the municipality, and it may be chargeable with their misfeasance and nonfeasance * * * To determine whether there is municipal responsibility, the inquiry must be whether the department whose misfeasance or nonfeasance is complained of is a part of the machinery for carrying on the municipal government, and whether it was at the time engaged in the discharge of a duty or charged with a

duty primarily resting upon the municipality. For these views the cases of *Bailey v. New York*, 3 Hill, 538 (38 Am. Dec. 669, 2 Denio, 433), and *Barnes v. District of Columbia*, 91 U. S. 540, are ample authority, and the case of *Richards v. New York*, 16 Jones & S. 315, is a precise authority."

The cases of *Bailey v. New York*, and *Barnes v. District of Columbia*, referred to by Mr. Justice EARL, are very much in point in the present discussion. In the former an action was brought against the City of New York by one who had been injured in his property by the careless construction of a dam across Croton River at a point about forty miles distant from the city, for use as a part of the system for supplying the city and its inhabitants with water. The work was constructed under the control of water commissioners appointed by the Governor, and in whose appointment the city had no voice; and it was contended there, as here, that the defendant was not chargeable for negligence or unskillfulness in the construction of the dam, because the commissioners were acting in a public capacity, and, like other public agents, not responsible for the misconduct of those necessarily appointed by them; and also on the ground that, inasmuch as the water commissioners were not appointed by the city, nor subject to its direction or control, it was not liable for their conduct. But Mr. Justice NELSON, in an opinion which, although it has been somewhat criticised, has stood the test of time, and is now generally regarded as sound, disposes of both of these objections in such a clear and lucid way as to leave but little to be said upon the subject. Examining the position that, "admitting the water commissioners to be the appointed agents of the defendants, still the latter are not liable, inasmuch as they were acting solely for the state in prosecuting the work in question, and therefore

are not responsible for the conduct of those necessarily employed by them for that purpose," he says: "We admit, if the defendants are to be regarded as occupying this relation, and are not chargeable with any want of diligence in the selection of agents, the conclusion contended for would seem to follow. They would then be entitled to all the immunities of public officers charged with a duty which, from its nature, could not be executed without availing themselves of the services of others; and the doctrine of *respondeat superior* does not apply to such cases. If a public officer authorize the doing of an act not within the scope of his authority, or if he be guilty of negligence in the discharge of duties to be performed by himself, he will be held responsible; but not for the misconduct or malfeasance of such persons as he is obliged to employ. * * * But this view cannot be maintained upon the facts before us. The powers conferred by the several acts of the legislature authorizing the execution of this great work are not, strictly and legally speaking, conferred for the benefit of the public. The grant is a special, private franchise, made as well for the private emolument and advantage of the city as for the public good. The state, in its sovereign character, has no interest in it. It owns no part of the work. The whole investment under the law, and the revenue and profits to be derived therefrom, are a part of the private property of the city; as much so as the lands and houses belonging to it situate within its corporate limits. The argument of the defendants' counsel confounds the powers in question with those belonging to the defendants in their character as a municipal or public body; such as are granted exclusively for public purposes to counties, cities, towns, and villages, where the corporations have, if I may so speak, no private estate or interest in the grant. As the powers

in question have been conferred upon one of these public corporations, thus blending in a measure those conferred for private advantage and emolument with those already possessed for public purposes, there is some difficulty, I admit, in separating them in the mind, and properly distinguishing the one class from the other, so as to distribute the responsibility attaching to the exercise of each. But the distinction is quite clear and well settled, and the process of separation practicable. To this end regard should be had, not so much to the nature and character of the various powers conferred, as to the object and purpose of the legislature in conferring them. If granted for public purposes exclusively, they belong to the corporate body in its public, political, or municipal character. But if the grant was for purposes of private advantage and emolument, though the public may derive a common benefit therefrom, the corporation, *quoad hoc*, is to be regarded as a private company. It stands on the same footing as would any individual or body of persons upon whom the like special franchises had been conferred."

And in answer to the objection that the commissioners were the agents of the state, and not the city, he says: "We have already given our views of the character of this work, and of the capacity in which the defendants hold the powers under which it has been executed. If we are not mistaken in that conclusion, and they are to be regarded as a private company, like any other body of men upon whom special franchises have been conferred for their own private advantage, such as banking and railroad corporations, then the appointment of the agents by the state did not make them less the agents of the defendants. The appointment in this way is but one of the conditions upon which the charter was granted, and stands on the footing of any other condition to be found

in the grant, subject to which it has been accepted. By accepting the charter, the defendants thereby adopted the commissioners as their own agents to carry on the work."

Barnes v. District of Columbia, 91 U. S. 540, was an action brought to recover damages for a personal injury received by the plaintiff in consequence of the defective condition of one of the streets of the City of Washington. By the act creating the municipal corporation of the District of Columbia it was provided that there should be a board of public works, composed of the City Governor and four other persons, to be appointed by the President, with the consent of the senate, who should have entire control of, and make all regulations which they shall deem necessary for, keeping in repair the streets, avenues, and alleys of the city; and the principal defense in the case was that, in view of these provisions, the municipality was not liable for the negligence of such board. But it was held that a municipal corporation, in the exercise of its duties, is a mere department of the state, having such powers as the state may, from time to time, at its pleasure, confer, and that it can act only by its agents and servants; but this does not mean or imply that the acts must be done by inferior or subordinate agents, but, on the contrary, the higher the authority of the agent, the greater is the responsibility of the principal. Mr. Justice HUNT, in speaking for the court, says: "A municipal corporation may act through its mayor, through its common council, or its legislative department, by whatever name called, its superintendent of streets, commissioner of highways, or board of public works, provided the act is within the province committed to its charge. Nor can it, in principle, be of the slightest consequence by what means these several officers are placed in their position—whether they are elected by the people of the municipi-

pality, or appointed by the President or a governor. The people are the recognized source of all authority, state and municipal; and to this authority it must come at last, whether immediately or by a circuitous process. An elected mayor or an appointed mayor derives his authority to act from the same source, to wit, that of the legislature. The whole municipal authority emanates from the legislature. Its legislative charter indicates its extent, and regulates the distribution of its powers, as well as the manner of selecting and compensating its agents. The judges of the supreme court of a state may be appointed by the Governor, with the consent of the senate, or they may be elected by the people. But the powers and duties of the judges are not affected by the manner of their selection. The mayor of a city may be elected by the people, or he may be appointed by the Governor, with the consent of the senate; but the slightest reflection will show that the powers of this officer, his position as the chief agent and representative of the city, are the same under either mode of appointment. Whether his act in a case in question is the act of and binding on the city depends upon his powers under the charter to act for the city, and whether he has acted in pursuance of them; not at all upon the manner of his election. It is equally unimportant from what source he receives compensation, or whether he serves without it." These authorities would indicate the true rule to be that the responsibility of the municipality for the acts of its officers or agents does not depend upon the manner of their appointment, but upon the duty devolved upon them. If such duty appertains to mere political or governmental affairs, the municipality is not liable; but if it pertains to the private affairs of the corporation, it is liable for their negligence, the same as a private individual.

Our attention is especially called by the defendant's counsel to the cases of *Maxmilian v. New York*, 62 N. Y. 160 (20 Am. Rep. 468); *Ham v. New York*, 70 N. Y. 459, and *Springfield Ins. Co. v. Village of Keeseville*, 148 N. Y. 46 (30 L. R. A. 660, 51 Am. St. Rep. 667, 42 N. E. 405). But, as pointed out by Mr. Justice EARL in *Ehrgott v. New York*, 96 N. Y. 264 (48 Am. Rep. 622), the *Maxmilian* and *Ham* cases were actions brought against the city for the negligence of employees of certain boards and commissions who were not engaged in the discharge of any duty which rested upon the city. And *Springfield Ins. Co. v. Keeseville*, was an action to recover damages for a failure to keep the water system belonging to the city in condition to furnish protection from fires, and was defeated on the ground that the use of water works for the extinguishment of fire was a public, and not a private, purpose,—a distinction which is quite clearly pointed out in *Edgerly v. City of Concord*, 62 N. H. 8 (13 Am. St. Rep. 533) which was an action brought to recover damages for an injury received through the negligent use of a fire hydrant by the officers and agents of the city. We conclude, therefore, that the City of Portland is liable for the negligent act of The Water Committee charged in the complaint, notwithstanding the fact that its members were appointed by the legislature, and are independent of the control of any other department of the city government.

5. And this brings us to the question as to whether there was sufficient evidence of negligence on the part of the servants or employees of the committee to carry the case to the jury. The evidence on behalf of the plaintiff was to the effect that the pipe in question was laid in 1892, by The Water Committee, and connected with the general water system of the city; that it burst twice, prior to the time of the accident which caused

the injury to plaintiff's goods, under an ordinary pressure; that at the time of the accident there was no unusual or extraordinary pressure upon the pipe, or reason why it should have burst at that time. The evidence further shows that a water pipe of its size and dimensions, when properly constructed and laid, will not ordinarily burst under such a pressure; and these circumstances, in our opinion, were sufficient to carry the case to the jury.

6. As a general proposition, a party who alleges negligence as a cause of action must, of course, prove it; but under some circumstances the accident itself and the consequent injury may be of such a nature as to raise a presumption of negligence, and thus cast upon the defendant the duty of showing that he was free from fault. The rule seems to be that whenever a thing which causes injury is shown to be under the management of the defendant, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of an explanation by the defendant, that the accident arose from a want of care: *Scott v. London Docks Co.*, 3 Hurlst. & C. 596. And to the same effect, see 1 *Shearman & Redfield*, Neg. §§ 59, 60; *Thompson*, Neg. 1230; *Mullen v. St. John*, 57 N. Y. 567 (15 Am. Rep. 530); *Warren v. Kauffman*, 2 Phila. 259; *Huey v. Gahlenbeck*, 121 Pa. 238 (6 Am. St. Rep. 790, note; 15 Atl. 520). It follows from these views that the judgment of the court below must be reversed, and a new trial ordered.

REVERSED

Argued 27 December, 1898; decided 16 January, 1899.

SHIPLEY v. HACHENEY.

[55 Pac. 971.]

1. **LIABILITY OF MUNICIPAL CORPORATIONS FOR INTEREST.**—The liability of a city for interest on its debts is ordinarily the same as that of an individual.
2. **MUNICIPAL CORPORATIONS—POWER TO ENACT ORDINANCE.**—Under a city charter empowering the council to appropriate money to pay the debts, liabilities, and expenditures of the city, and requiring the treasurer to pay interest on interest-bearing warrants, that body may enact an ordinance requiring the city treasurer, on presentation to him of a warrant for the payment of which he has no appropriate funds, to indorse it, and providing that after such indorsement it shall bear a stated rate of interest, which is not higher than the legal rate.
3. **IDEM.**—An authority to appropriate money for the payment of the debts of a city, considered in connection with the general power accorded to all chartered municipalities, and the implied powers accompanying the same, unless specially restricted, to enter into contracts necessary to enable them to carry out the powers conferred, is sufficient to justify an ordinance providing for the payment of interest on overdue obligations of the city: *Portland Lumbering Co. v. City of East Portland*, 18 Or. 21, cited.
4. **CONTRACT TO PAY INTEREST—SUBSEQUENT LEGISLATION.**—The presentation of a warrant, and its indorsement as prescribed by an ordinance, constitute a contract between the city and the warrant holder entitling the latter to the stated rate of interest until the warrant is paid, or notice given to him of sufficient funds to pay it, which is not affected by subsequent legislation changing the rate of interest on similar demands: *Seton v. Hoyt*, 34 Or. 206, followed.
5. **RATIFICATION OF CONTRACT.**—Portland City Charter, § 218, adopted October 22, 1898, authorizing the issuance of bonds to retire outstanding warrants against the city's general fund, which warrants it declares valid and binding obligations against the city, and requires the treasurer to pay out of the proceeds of such bonds, is a recognition and ratification of the city's obligation to pay valid outstanding warrants against the general fund, and interest thereon at eight per cent., as provided for by an ordinance passed under prior charter authority, in spite of the act of October 14, 1898 (*Laws*, 1898, Sp. Sess. p. 15), reducing the legal rate of interest to six per cent.

From Multnomah: ALFRED F. SEARS JR., Judge.

This is a mandamus proceeding brought by W. J. Shipley against Frank Hachenev, as Treasurer of the City of Portland, to coerce the payment of eight per cent. per annum upon an interest-bearing warrant of said city, issued January 20, 1898, notwithstanding the reduction

34	308
35	481
34	308
35	175
36	176
34	308
48	812

of the legal rate of interest to six per cent. by the act of October 14, 1898 (Laws, 1898, Sp. Sess. p. 15). The judgment of the court below was for the plaintiff, and the defendant appeals.

Ordinance No. 8634 of said city, adopted in December, 1893, provides, among other things, that the city treasurer shall keep a record of all warrants presented to him for payment, and, if he has no appropriate funds with which to pay them, he shall indorse thereon the word "Presented," with the date thereof, and subscribe his name and office. It is further provided that all such warrants shall bear interest at the rate of eight per cent. per annum until there are sufficient funds in the hands of the treasurer with which to pay the same, and the holder is so notified.

AFFIRMED.

For respondent there was a brief and an oral argument by *Mr. Wm. A. Cleland*.

For appellant there was a brief over the names of *Joel M. Long*, City Attorney, and *Richard Williams*, with an oral argument by *Mr. Long*.

MR. CHIEF JUSTICE WOLVERTON, after stating the facts, delivered the opinion of the court.

It is urged: First, that a city, like a sovereign state or county, which is an agency of the state, is not required to pay interest unless self-imposed; and, second, that the common council was without power or authority under the charter to pass said ordinance requiring the city to pay interest at the rate of eight per cent. upon indorsed warrants. These propositions are combated by plaintiff, who urges (1) that a city is liable for the payment of interest under general law like an individual; (2) that

the council had the requisite power for the enactment of ordinance No. 8634; and, (3), as a further proposition, that by sections 218 and 219, of the new charter, which took effect October 22, 1898, the city has recognized all outstanding city warrants as valid and subsisting obligations against it, and has thereby, and by virtue of section 233, ratified said ordinance, and the acts of the officers touching the issuance and indorsement of such warrants, and hence that the interest charge of eight per cent. is still a valid claim against the city.

1. We have just decided, *Seton v. Hoyt*, 34 Or. 266, (43 L. R. A. 634, 55 Pac. 967), that a county, being essentially but an agency or instrumentality of the state for general governmental purposes, is subject to like rules and restrictions governing its liabilities for the payment of interest as the state, and is not within the purview of the general law regulating the rate and payment of interest upon money due, or to become due, which proposition is found to rest upon the principle that a sovereign state is not bound by the words of a statute, unless expressly named. We are of the opinion, however, that the rule does not extend to municipalities in the strict sense of that term. The state makes use of the counties, which are *quasi* corporations of its own creation, that it may the more effectually discharge its appointed duties.

"Counties are," says Mr. Dillon, "involuntary political or civil divisions of the state, created by general laws to aid in the administration of government. Their powers are not uniform in all the states, but these generally relate to the administration of justice, the support of the poor, the establishment and repair of highways. All are matters of state as distinguished from municipal concern. They are purely auxiliaries of the state; and to the general statutes of the state they owe their creation, and the statutes confer upon them all the powers

they possess, prescribe all the duties they owe, and impose all the liabilities to which they are subject. Considered with respect to the limited number of their corporate powers, the bodies above named rank low down in the scale or grade of corporate existence, and have been frequently termed *quasi* corporations. This designation distinguishes them, on the one hand, from private corporations aggregate, and, on the other, from municipal corporations proper, such as cities or towns acting under charters or incorporating statutes, and which are invested with more powers, and endowed with special functions relating to the particular or local interests of the municipality, and to this end are granted a larger measure of corporate life :'' Dillon, Mun. Corp. (4 ed.), § 25. A municipal corporation proper is called into being either at the direct solicitation or by the tacit consent of the people seeking its benefit, and is mainly and primarily for their interest, advantage, and convenience. While, in a sense, it is an agency of the state to assist in the civil government of all the inhabitants, yet its chief and paramount purpose is to promote local self-government, and to regulate and administer the local or internal affairs of the city, town, or district incorporated : Dillon, Mun. Corp. §§ 19, 20, 22, 23 ; *Board of Commissioners v. Mighels*, 7 Ohio St. 109 ; and *Commissioners of Talbot County v. Commissioners of Queen Anne's County*, 50 Md. 245.

There naturally ensues, from the difference in method and purposes of creation, a distinction as it respects liabilities between a municipal corporation proper and the *quasi* corporation ; and it is well settled that the municipality is subject to a much larger range of liabilities, both of omission and commission, than a corporation of the *quasi* class : Dillon, Mun. Corp. (4 ed.), §§ 26, 966. See, also, *Esberg Cigar Co. v. City of Portland*, 34 Or. 282

(43 L. R. A. 435, 55 Pac. 961). So it is said, in manifest harmony with this distinction, that the rule in respect to the corporate indebtedness of the municipality does not ordinarily differ from that which applies to individuals: Dillon, Mun. Corp. § 506. The doctrine is also sustained and promulgated by judicial utterances. In *Murphy v. City of Omaha*, 33 Neb. 402, 408 (50 N. W. 267), it is said: "In the absence of any contract that payment shall be delayed, the city will be liable for interest like any other debtor. * * * In its business transactions a city should be required to conform to the ordinary rules, and all exemptions claimed which would work injustice should be denied." Upon the same principle, interest was allowed against the town in *Langdon v. Town of Castleton*, 30 Vt. 285. See, also, *Pruyn v. City of Milwaukee*, 18 Wis. 367; *City of Grand Rapids v. Blakely*, 40 Mich. 367 (29 Am. Rep. 539); *State ex rel. v. Trustees of Town of Pacific*, 61 Mo. 155; *City of Scranton v. Hyde Park Gas Co.*, 102 Pa. St. 382.

2. It would seem, however, that the power of the city council under the charter was adequate to the enactment of ordinance No. 8,634, providing for the payment of eight per cent. interest upon warrants presented and not paid for want of funds. The rate was not above that established by general law, and the charter provisions empowering the city council "to appropriate money to pay the debts and liabilities and expenditures of the city, or any department thereof, or any item thereof," and requiring the treasurer, upon warrants drawing interest, to compute and pay such interest (subd. 38, section 36, and section 47, Charter of the City of Portland, as amended 1893), seem to imply that such power was within the intendment of the legislature in the adoption of the charter.

3. However that may be, if these provisions be con-

strued and considered in connection with the general powers accorded all chartered municipalities, and the necessarily implied power accompanying the same, unless specially restricted by charter regulations, to enter into contracts necessary to enable them to carry out the powers conferred, the authority of the council for the adoption of said ordinance is reasonably clear and ample to the purposes of its adoption: 15 Am. & Eng. Enc. Law (1 ed.), 1080; *Portland Lumbering Co. v. City of East Portland*, 18 Or. 21, 34 (6 L. R. A. 290, 22 Pac. 536).

4. Ordinance No. 8,634, being such a one as the council had power to adopt, the presentation of the warrant, and its indorsement in obedience to the stipulations prescribed, constituted a contract between the warrant holder and the city to pay interest upon the obligation or demand at the rate of eight per cent. per annum, and the legal effect of such a contract, as we have seen in *Seton v. Hoyt*, 34 Or. 266 (43 L. R. A. 634, 55 Pac. 967), is that such interest shall continue until the warrant is paid, or notice given of sufficient funds with which to discharge the obligation. Indeed, such are the very terms of the ordinance, and the case is much stronger requiring the payment of interest at the rate prevailing at the time of the indorsement of the warrant until paid, or until funds are in hand, than the case of *Seton v. Hoyt*. We hold, therefore, that the late act of the legislature, changing the legal rate of interest chargeable upon certain demands in said act enumerated, had not the effect to decrease the rate collectible upon the warrant in suit from the date such act became operative, but that the obligation is to pay interest at the rate prescribed by the ordinance until the city is in funds with which to meet the warrant and the holder notified thereof.

5. There is yet another feature of the case which

impels us to this result. The city charter was amended and took effect October 22, 1898. By section 218 the city is authorized to dispose of bonds for the declared purpose "of retiring warrants heretofore issued and now outstanding against said city, drawn upon the general fund, * * * which warrants are hereby declared to be valid and binding obligations of said city." By subsequent provisions the treasurer is required to pay such warrants out of the fund to be derived from the sale of such bonds. This we believe to be a recognition and ratification of the city's obligation to pay the outstanding warrants against the general fund, if otherwise valid demands against the city, in view of and under the conditions imposed and then prevailing, both as it relates to their issuance and the ordinances under which they were made to bear interest. The fact that Ordinance No. 8,634 was continued in force by virtue of section 233 of the new charter does not seem to affect the issues. These considerations affirm the judgment of the court below, and it is so ordered.

AFFIRMED.

Argued 18 December, 1898; decided 28 January, 1899.

FELDMAN v. MCGUIRE.

[55 Pac. 872.]

84	309
42	478
34	309
46	242

1. **CONTRACTS FOR THE BENEFIT OF THIRD PERSONS—NOVATION.**—Where one has received from another some fund or property, in consideration of which he has made a promise to or entered into an undertaking with such other for the benefit of a third person, an action thereon may be maintained by such person, though not a party to the transaction.
2. **PROMISE TO PAY ANOTHER'S DEBT—STATUTE OF FRAUDS.**—A promise to pay another's debt in consideration of the receipt of a fund for that purpose is not within the statute of frauds, and may be proved by parol: *Strong v. Kamm*, 18 Or. 172, approved.
3. **ASSUMING INDEBTEDNESS—EVIDENCE.**—Whether one who has promised to pay debts of another has received money or property in consideration of the promise is a controlling circumstance in the transaction.

4. *IDEM.*—The liability of one who undertakes to pay the debts of another is not affected by the fact that the debtor remains liable to the creditor.
5. *IDEM.*—An agreement to pay the debts of another, in consideration of a conveyance of land, does not come within the statute of frauds where the contract as to the property is completely executed.
6. *DECLARATIONS AGAINST INTEREST.*—Answers filed by defendant making admissions against his interest are admissible against him in a subsequent suit between the same parties.
7. *EVIDENCE.*—Deeds, mortgages, and judgments making a transfer of all the property of a debtor are admissible in an action by a creditor against the transferee, who is alleged to have undertaken to pay the grantor's debts.
8. *TRIAL—NONSUIT.*—Where there is evidence from which a jury may reasonably infer that the allegations of a complaint are true, a nonsuit should not be granted.
9. *ESTOPPEL.*—A decree that deeds claimed to be fraudulent were supported by the agreement of the grantee to pay certain creditors of the grantor, does not estop another creditor from asserting that such grantee agreed to pay his claim, since defendant may have agreed to assume more of his grantor's indebtedness than he found necessary to prove to sustain his defense in the prior proceeding.

From Multnomah: E. D. SHATTUCK, Judge.

Action by Maria Feldman against W. W. McGuire. In March, 1890, one Adolph Nicolai was indebted to many persons, including the plaintiff, and transferred much of his property to the defendant and his wife. These deeds were attacked by Mrs. Feldman as fraudulent, but were sustained as having been made for a valuable consideration: *Feldman v. Nicolai*, 28 Or. 34. Thereupon the same plaintiff commenced this action, and recovered a judgment.

AFFIRMED.

For appellant there was a brief over the name of *Mitchell & Tanner*, with an oral argument by *Mr. Albert H. Tanner*.

For respondent there was a brief over the name of *Watson, Beekman & Watson*, with an oral argument by *Mr. Edward B. Watson*.

MR. CHIEF JUSTICE WOLVERTON delivered the opinion.

The facts constituting the basis of this action, as exhibited by the complaint, are that prior to March 27, 1890, Adolph Nicolai was indebted to plaintiff, and that about said day the defendant, in consideration of the conveyance and transfer by Nicolai to him and his wife of certain real property, undertook and agreed with the said Nicolai to pay to the respective owners and holders thereof all his debts and liabilities, amounting to about \$30,000, which comprised the indebtedness to plaintiff, and that defendant has failed to satisfy the same or any part thereof.

1. The promise or agreement of defendant with Nicolai to pay and discharge his debts and liabilities, and among them the debt to plaintiff, was not in writing; and, evidence of the verbal undertaking of defendant having been admitted over his objections, the question is presented whether the agreement as stated is within the statute of frauds, and therefore not susceptible of legal proof. The law may now be regarded as well settled in this state that where a person has received from another some fund, property, or thing in consideration of which he has made a promise or entered into an undertaking with such other, but directly and primarily for the benefit of a third, such third party may maintain an action directly upon such promise or undertaking so made and entered into for his benefit, although not a party to the transaction. In such case the third party acquires an equitable interest in the property, fund, or thing; and the law, acting upon the relationship of the parties and their treatment of the fund, establishes the requisite privity, creates a duty, and implies a promise which will support the action: *Parker v. Jeffery*, 26 Or. 186 (37 Pac. 712); *Washburn v.*

Investment Co., 26 Or. 436 (36 Pac. 533, and 38 Pac. 620); *Brower Lumber Co. v. Miller*, 28 Or. 565 (52 Am. St. Rep. 807, 43 Pac. 659); *First Nat. Bank v. Hovey*, 34 Or. 162 (55 Pac. 535). These cases define the scope and illustrate the application of the rule giving the action, which was established by the earlier cases of *Baker v. Eglin*, 11 Or. 333 (8 Pac. 280); *Hughes v. Oregon Ry. & Nav. Co.*, 11 Or. 437 (5 Pac. 206); *Schneider v. White*, 12 Or. 503 (8 Pac. 652); and *Chrisman v. Insurance Co.*, 16 Or. 283 (18 Pac. 466).

2. Dependent upon this principle is the question, which is now urged, whether the action can be maintained in the absence of the special quality of proof required by the statute of frauds. There is much conflict in the authorities, but the decided weight thereof supports the contention that the contract or transaction upon which such an action is based is not within the statute. The reasons urged are that the contract is not one of suretyship, but an original undertaking between the debtor and the promisor, based upon a sufficient consideration, which operates to the benefit of the creditor. The party promising has for his object some benefit or advantage accruing to himself, and on that consideration makes the promise; and this, it is said, distinguishes the transaction as an original undertaking. Furthermore, the promise is not to the creditor, but to the debtor, and is to pay such debtor the amount due him, or the consideration agreed upon, by paying or answering for it to his creditor; and the law implies the contract between the promisor and the creditor because it is incidentally for his benefit, and therefore gives him the right of action. DIXON, C. J., in *Putney v. Farnham*, 27 Wis. 187 (9 Am. Rep. 459), speaking of such a transaction, says: "It was a guaranty in form, but not in substance or effect, within the meaning of the statute of frauds. It was not

a mere promise by the defendant to be responsible for the debts of Corlett to those parties, and to pay those debts, but a promise by him to pay his own debt in that particular way. It was a promise founded upon a new and sufficient consideration, moving to the promisor from the debtor at the time the promise was made. Such a promise or agreement is not within the statute of frauds, and no note or memorandum in writing expressing the consideration, and subscribed by the party to be charged therewith, is required." Mr. Reed, in his work on the Statute of Frauds (section 82, vol. 1), says: "The commoner instance of the creditor's right to sue being sustained is where the guarantor has bought property of the debtor, and, in payment of the price, has engaged to assume the debt. This obligation * * * is not within the statute of frauds, being a promise to pay the promisor's own debt, the recipient of the payment being the promisor's creditor, instead of the promisor himself." In support of the general proposition that the case is not within the statute, see *Mallory v. Gillett*, 21 N. Y. 413; *Hoile v. Bailey*, 58 Wis. 434 (14 N. W. 628); *Ware v. Allen*, 64 Miss. 545 (1 South. 738); *Clinton National Bank v. Studemann*, 74 Iowa, 104 (37 N. W. 112); *Windell v. Hudson*, 102 Ind. 521 (2 N. E. 303); *De Walt v. Hartzell*, 7 Colo. 601 (4 Pac. 1201); *Browne*, Stat. Frauds, § 166b. The rule has been practically adopted in this state, *Strong v. Kamm*, 13 Or. 172 (9 Pac. 331), and, in our opinion, ought to prevail, because it is supported by reason as well as authority.

3. It is pertinent to add that the question whether the promisor has received money or property in consideration of the promise has, in general, been regarded as a controlling circumstance or factor in the transaction: *Blunt v. Boyd*, 3 Barb. 209.

4. The fact that Nicolai remains liable to plaintiff does

not affect the liability of defendant: *Farley v. Cleveland*, 4 Cow. 432; *Hoile v. Bailey*, 58 Wis. 434 (14 N. W. 628). So there was no error in admitting testimony of the oral contract or undertaking.

5. Nor was the contract within the statute of frauds because it concerned real property. As to such property it was completely executed. The deeds had passed, and the title had vested in the grantees; besides, the action was not concerning that species of property.

6. The plaintiff, to sustain her cause, offered in evidence several exhibits, which were all received, and marked, respectively, "A," "B," "C," "D," "E," "F," and "G," over the objections of the defendant, who claims that they were entirely irrelevant, and could have had no other effect than to prejudice and mislead the jury to his injury. Exhibit A is a deed executed and delivered by Adolph Nicolai, and Caroline, his wife, to defendant, April 1, 1890, to certain real property, reciting a consideration of \$8,500. Exhibit B is likewise a deed from Nicolai and wife to Rosalie McGuire, wife of defendant, to certain premises, executed October 20, 1890, reciting a consideration of \$1. Exhibit C is a mortgage upon property acquired from Nicolai, executed by defendant and wife to Henry Weinhard, January 9, 1891, to secure the payment of a promissory note given, of even date, by defendant to Weinhard, for the sum of \$2,250. Exhibit D is the judgement roll in a suit instituted by plaintiff against Rosalie McGuire and the defendant herein, to set aside the said deed executed to her by Nicolai, upon the ground that it was a voluntary conveyance made without consideration, and with intent to defraud the creditors of Nicolai. The defendants in that suit answered, setting up, among other things, that, as a consideration for such conveyance, they had assumed and agreed to pay about \$30,000 of Nicolai's indebtedness

which he owed to sundry persons, and which included certain indebtedness owing by Nicolai to the defendant McGuire. There was a bill of particulars filed by McGuire in that case showing an aggregate of such indebtedness so alleged to have been assumed by him of \$29,538.12. This suit was dismissed March 26, 1892, on motion of plaintiff, without a trial. Exhibit E is the judgment roll in a suit instituted by the plaintiff in this action, and others, against the defendant and his wife, to set aside both of the deeds heretofore denoted as exhibits A and B. To this suit the defendants interposed a like answer as was filed in the former, and it resulted after trial upon the merits, in a dismissal of the complaint. Exhibit F is the judgment roll in an action by Henry Weinhard against Adolph Nicolai, showing judgment by default; and exhibit G is a schedule of docketed judgments against Nicolai. The purpose of these exhibits, taken as a whole, and considered in connection with the defendant's own testimony, was to show that Nicolai had transferred all of his property to defendant and his wife, and that in consideration thereof the defendant had agreed to pay Nicolai's indebtedness. That defendant did in fact agree to pay about \$30,000 of Nicolai's indebtedness is established by the answers filed in the suits instituted and disposed of before this action was begun. These answers of defendant, being against his interest, and he being a party to the action, were admissible to establish plaintiff's cause.

7. The schedule alluded to as having been filed by the defendant in the suit to set aside one of the conveyances did not contain, as an item thereof, the debt due the plaintiff herein, nor did it contain as an item the debt due Weinhard; but it afterwards appears by defendant's own testimony that he paid Weinhard's debt, and there was no other consideration inducing such pay-

ment except the conveyances denoted by the exhibits A and B. There was some evidence also indicating that two items contained in said schedule, amounting to \$1,454, were fictitious, which would leave that amount of the debts assumed by defendant unidentified, and is more than sufficient to cover plaintiff's claim. In short, the effort was to prove that defendant had assumed and agreed to pay all of Nicolai's indebtedness, and that all of such legitimate indebtedness did not exceed \$30,000, and, therefore, that the defendant had agreed to pay the plaintiff's claim or demand against Nicolai. The agreement, if one existed, to pay all of such indebtedness, was known only to defendant and Nicolai, whose interests were adverse to plaintiff's in the present action, and hence resort was had to indirect testimony to establish the agreement. When properly understood, we think the exhibits were competent, and, taken in connection with the testimony of the defendant, had some tendency to establish plaintiff's case, and were therefore properly admitted. We may say, by way of explanation, that defendant was not called in this case as a witness, but his testimony, taken in one of the suits before alluded to, was read to the jury, and was properly admitted as admissions against his interest.

8. When the plaintiff rested, the defendant moved for a nonsuit, and the refusal of the court to grant the motion is assigned as error. Besides the effect of the exhibits heretofore discussed as evidence in the cause, certain statements of the defendant touching the transfer for the real property by Nicolai to him and his wife, and the purpose for which they were made, were proven. Among others, Charles H. Feldman testifies that defendant told him, "If he could get Nicolai straightened up—get him to fix things up, and turn the property over to him—he would square up these claims;" and later that,

"If he could get him to straighten up, he would take the property, and settle up these claims, and set him on his feet again." These statements were elicited when witness was endeavoring to get McGuire to settle a claim he held against Nicolai. He further testified that his mother's (the plaintiff's) claim was mentioned, and that McGuire said, "Yes; I will pay that claim of your mother's," and that "If he could get him (Nicolai) straightened up, and get the property, he would pay my mother's claim." John E. Doyle testified as follows: "I had a conversation with McGuire, and I asked him why Nicolai turned over his property to him. Then McGuire said that Nicolai would not be very able to straighten out his matters, so that, when he had hold of the property and in his name, he would straighten out Nicolai's affairs better than Nicolai himself; that is, he would pay such accounts as were standing out, and so on." Without further allusion to the testimony, it is quite apparent that there is here, when taken in connection with the exhibits heretofore alluded to, and their effect as evidence, enough to go to the jury from which they might infer that such a contract existed as is alleged in the complaint, and hence that the nonsuit was properly refused.

9. As a defense to plaintiff's cause of action, the defendant set up, by way of estoppel, the proceedings and the purport and effect of the decree in the case of Maria Feldman, executrix, *et al.*, against McGuire and his wife, the judgment roll of which was offered in evidence by both parties, and was introduced as exhibit E; and it is claimed that the effect of such decree was to determine that the claim now in controversy constituted no part of the consideration for said deeds, and, therefore, that plaintiff ought not now to be permitted to prosecute this action. The court, by its instructions, refused to

give effect to the decree as an estoppel, and error is assigned by reason thereof. The purpose of that suit was to have the deeds set aside as fraudulent and void, as to creditors, and it became incumbent upon the defendant, in order to support the deeds, to show that he had paid an adequate consideration for the premises conveyed, so that the sole issue was touching the *bona fides* of the transfers. The court found that McGuire had assumed and agreed to pay, and did pay, certain indebtedness of Nicolai, and this was held to be sufficient and adequate to support the deeds. Whether McGuire had assumed and agreed to pay the special claim of plaintiff was not an issue in that proceeding. He was concerned only in satisfying the court that he had in good faith paid adequately for the property, and the plaintiffs therein were proceeding upon the theory that he had paid nothing. So, it might have been that McGuire had assumed and agreed to pay much more of Nicolai's indebtedness than he chose or found necessary to prove in that proceeding in order to sustain his defense; and, if so, the adjudication could not bind or preclude plaintiff from now asserting that McGuire had also assumed and agreed to pay her claim as a part of such consideration. As sustaining this view, *Campbell v. Consalus*, 25 N. Y. 613, is a case of some analogy. Interest was properly allowed by the verdict, as the basis of the action is a promissory note drawing interest. The judgment of the court below should be affirmed.

AFFIRMED.

Argued 19 December, 1898; decided 30 January, 1899.

ROBINSON v. CARLON.

[55 Pac. 959.]

VERITY OF RECORD.—*Prima facie* a certified record recites the facts, it imports verity; thus, where a transcript states that after a certain pleading had been filed, the cause "was tried by a jury upon the issues joined by the pleadings," the appellate court must infer that the particular pleading was a factor in the trial, though the party who filed it insists that it was used only in determining a motion.

HARMLESS ERROR.—The prevailing party cannot complain that certain papers or pleadings presented by the other side were considered, for no injury resulted if error was committed.

SUPPLEMENTAL COMPLAINT—ACCORD AND SATISFACTION.—Matters pertinent to the issues, and which may prove controlling in the final disposition of the cause arising subsequent to the judgment in the justice's court, are not precluded from the consideration of the circuit court upon appeal, but may appropriately be brought onto the record by a supplemental complaint: *Meyer v. Edwards*, 31 Or. 28, distinguished.

SUFFICIENCY OF SUPPLEMENTAL COMPLAINT.—A supplemental complaint filed in the circuit court after defendant had appealed, setting up an accord and satisfaction entered into after the judgment was rendered, is sufficient without setting up the original cause of action, since the two papers are not designed to accomplish the same purpose.

From Douglas: J. C. FULLERTON, Judge.

This is an action by L. T. Robinson for the possession of a horse, commenced in a justice's court, the complaint containing the allegations usual and essential in such a case. The defendants answered separately by specific denials. As a further defense, William Carlon alleges that the horse was not, at the commencement of the action, in his possession, nor under his control, and J. W. Carlon set up that he had the lawful possession of the property, and was entitled thereto as owner. Trial was had, which resulted in a judgment for plaintiff. After judgment, but of the same date, the justice made an entry in his docket to the effect that the parties had settled the controversy, and that by mutual consent the

defendants were to surrender the property to plaintiff, and pay the costs, and plaintiff to relinquish his claim for damages. The defendants, however, perfected an appeal to the circuit court, and the plaintiff there interposed a motion to dismiss the same upon the ground that it appeared from the transcript that the case had been settled by the parties, and that the right of appeal had been thereby waived. This motion was denied. Thereupon, by leave of the court, the plaintiff filed a supplemental complaint, setting up that since filing the original complaint, to wit, on March 11, 1896, the plaintiff and defendants had settled all matters in dispute, the defendants then agreeing to deliver the horse in controversy to plaintiff, and pay the costs of the action, and plaintiff agreeing to relinquish his claim for damages, and not to issue execution for costs within ninety days, and that in pursuance of said settlement the defendants delivered up the horse to plaintiff, who received the same, and relinquished his claim for damages, and has refrained from the issuance of execution, although more than ninety days had elapsed. The prayer is for judgment as demanded in the original complaint, and for the costs and disbursements. To this complaint a demurrer was filed and overruled, and defendants answered by denying the allegations *in toto*. Thereupon a trial was had, resulting in a verdict and judgment in favor of plaintiff for the recovery of the horse, but without damages, and the defendants appeal to this court.

AFFIRMED.

For appellants there was a brief over the names of *J. W. Hamilton* and *E. D. Stratford*, with an oral argument by *Mr. F. W. Benson*.

For respondent there was a brief over the names of *A. M. Crawford* and *W. R. Willis*, with an oral argument by *Mr. Crawford*.

MR. CHIEF JUSTICE WOLVERTON, after making the foregoing statement of facts, delivered the opinion of the court.

Error is assigned touching the action of the circuit court in permitting the supplemental complaint to be filed therein, and of this we will now inquire. The matter pleaded, if true, is an effective accord and satisfaction had and entered into between the parties to the action subsequent to the judgment in the justice's court, and prior to the taking of the appeal therefrom. It was sufficient to support the motion for the dismissal of the appeal, and yet it was a substantial plea in bar of the defense theretofore interposed by defendants against plaintiff's cause of action, except as it pertained to the question of damages. At the argument it was insisted, on the part of the plaintiff, that the only purpose of filing the so-called supplemental complaint, and the only use made of it in the court below, was to induce a dismissal of the appeal. But in the light of the record, it appears that the cause "was tried by a jury upon the issues joined by said pleadings," and we are bound to infer that the supplemental pleadings entered into and constituted a factor in the trial before the jury. The prayer of the supplemental complaint would indicate that such had even been the purpose of the pleader in interposing it. But the court refused to dismiss the appeal, and, its action in that regard being favorable to appellants, they could not complain upon that ground.

It is urged, however, that the supplemental complaint tendered a new issue in the circuit court, which rendered

its filing objectionable, and in this connection we may determine its sufficiency as tested by the demurrer thereto. That it tendered a new issue, and was so designed, there can be no question. But the issue was touching matter that arose subsequent to the entry of judgment in the justice's court, and which, if true, was a complete bar to any further proceedings in the cause, as the whole controversy had been settled out of court, and neither party should be thereafter contending for trial in the circuit court or elsewhere upon issues that did not exist in fact, and upon which no real controversy was depending. In the late case of *Meyer v. Edwards*, 31 Or. 23 (48 Pac. 696), Mr. Justice BEAN, who wrote the prevailing opinion, in passing upon the amended act regulating the practice in justices' courts, says: "The plaintiff cannot be permitted to introduce any new items or cause of action not embraced or intended to be included in the original account or statement as filed by him." This, however, has reference to matter existing at the time of the commencement of the action, and which might have been insisted upon at that time in support thereof, and not to matter subsequently arising which might be determinative of the cause. The trial in the circuit court is anew, and it is believed that it was not intended by such practice act to deprive either party from there insisting upon any matter pertinent to the issues, and which might prove controlling in the final disposition of the cause which may have arisen subsequent to the formation of the issues and judgment in the justice's court. The novelty of the case consists in the plaintiff's insisting upon the plea of accord and satisfaction. If it was in the court of original jurisdiction, he could have dismissed his action, and that would be the end of the case, which it was the purpose of the accord to accomplish. But upon the appeal the defend-

ants have become the actors, and the plaintiff could not dismiss the case upon his own motion, and it would seem that he ought to have the advantage of the accord and satisfaction in some manner, so that he may be relieved of the judgment which the defendants were insisting upon having entered in the circuit court in the face of their deliberate settlement of the case out of court. Not to allow the plea and the new matter to be considered would work a grave injustice upon the plaintiff after he had been led to suppose that his case was absolutely and finally settled upon satisfactory terms. In this light it was quite proper to permit the supplementary complaint to be filed, and, as it was not designed, nor was it essential, to set up the cause anew, but only such matters affecting the case as had arisen subsequent to the entry of judgment in the justice's court, said complaint was quite sufficient, and the demurrer thereto was rightly overruled. Judgment should be affirmed.

AFFIRMED.

Argued 12 January; decided 13 March, 1899.

WATSON v. LOEWENBERG.

[56 Pac. 289.]

1. **PLEADING — DENIAL OF AFFIDAVIT FOR ATTACHMENT.**—A traverse of the acts alleged in an affidavit for attachment must deny every statutory ground alleged in as direct and explicit terms as if it were an answer to a complaint, and it must be tested by the same rules of pleading.
2. **WHEN SECURITY WILL PREVENT ATTACHMENT.**—The security referred to in Section 144, Hill's Ann. Laws, the possession of which will prevent the issuing of an attachment, must be conceded and unquestioned, and not a disputed or contingent security.
3. **DISSOLVING ATTACHMENT — SUFFICIENCY OF AFFIDAVIT.**—An attachment will not be set aside on the ground that the indebtedness sued upon is secured where the traversing affidavit does not allege or admit that fact, but states that plaintiff's assignor claims the right to hold certain property in its possession as collateral security for the indebtedness sued on, and contends that if that is true the attachment should be dismissed.

From Multnomah : THOS. A. STEPHENS, Judge.

This action was commenced on the thirty-first of January, 1895, by J. Frank Watson to recover from Julius Loewenberg upon four separate promissory notes, aggregating in amount about \$16,000, made by defendant to the Merchants' National Bank, and by it assigned and transferred to the plaintiff for collection, who, at the time the action was commenced, caused a writ of attachment to be issued and certain personal property and various parcels of real estate attached as security for any judgment which the plaintiff might recover. On the twenty-first of February, 1895, the defendant moved to discharge the writ, on the ground that the affidavit upon which the same was obtained "was untrue and false." This motion was based on an affidavit of the defendant which, without denying any of the allegations of the affidavit for the writ, was to the effect that he was the owner of one hundred and fifteen shares of the capital stock of the Northwest Fire and Marine Insurance Company, ten of the Bank of Joseph, and five of the Polk County Bank, and that one S. Oppenheimer was the owner of seven hundred and forty-eight shares of the capital stock of the Northwest Foundry, which had been sold to him by affiant on the second of January, 1895. That at the time of such sale, the foundry and other stock referred to, was in possession of Messrs. Ladd & Bush, bankers, of Salem, Oregon, and that thereafter, and before the assignment to plaintiff of the notes mentioned in the complaint, all of such stock came into the possession of plaintiff's assignor, and plaintiff now claims the right to hold the same, on the ground that it was pledged by affiant to his assignor as security for the notes sued on; that while he never consented to the bank's possession of such property, and never pledged the same to it,

yet it retains possession thereof, and is claiming a lien thereon to secure the indebtedness mentioned in the complaint, together with other indebtedness.

On the twenty-eighth of February, 1895, McElroy, the cashier of the Merchants' National Bank, made a counter affidavit to the effect that he had knowledge of the various debts upon which the plaintiff's action is based, and that no security existed therefor in the hands of the plaintiff at the time of the transfer and assignment to him of such notes. He further states that the stock of the Bank of Joseph, and the Polk County Bank, mentioned in defendant's affidavit, is owned by the Merchants' National Bank, and the other stock referred to therein is pledged to and held by such bank as collateral security for debts and demands due it from the defendant, and is not held or pledged for any of the debts sued upon by the plaintiff. On the same date the plaintiff filed an affidavit, similar in effect to that of McElroy, in which he says: "I have not, nor have I ever had or claimed to have any lien, pledge, or security for the payment of any of the demands mentioned in the defendant's affidavit, except by virtue of the attachment in this action."

Before the motion for the discharge of the attachment was brought on for hearing, or disposed of in any way, the Merchants' National Bank commenced a suit in equity to foreclose the lien which it claimed on the stock in question, alleging that it had been pledged to it by defendant to secure certain indebtedness. A day or two thereafter Loewenberg filed an additional affidavit in the action brought against him by the plaintiff, in which he stated: "That none of the property mentioned in my affidavit in the above entitled cause was at any time pledged to the Merchants' National Bank, or any other firm or corporation, except Ladd & Bush; that none of

said property is or was held by the said Merchants' National Bank, or any other person, firm, or corporation as security for said or any indebtedness; that the shares of stock of the Northwest Foundry Company were transferred to Sol Oppenheimer to secure him in the sum of about \$15,000, which is due from me to him and Mr. Philip Goldsmith, of New York City, and said transfer was made in writing on the second day of January, 1895, and said stock was then transferred to him for said purpose, and he now holds the same; that at no time had I transferred or caused to be transferred said or any stock to the Merchants' National Bank as security, or otherwise." Upon the filing of this affidavit, the motion to discharge the attachment was necessarily abandoned. But the referee in the suit by the bank against the defendant to foreclose its alleged lien upon the stock referred to having subsequently made and filed findings of fact and conclusions of law therein to the effect that the stock in question was, prior to the assignment to the plaintiff of the notes upon which this action is based, pledged to the bank by the defendant as security for his indebtedness to it, including such notes, subject to a prior lien in favor of Oppenheimer for about \$15,000, the defendant filed another motion to discharge the attachment, on the ground that the affidavit upon which the same was obtained is untrue and false, and "because the said bank claims to hold and has actual possession of personal property of the said defendant, which it claims to hold as collateral security for all of the indebtedness of the said defendant to the said bank and the said plaintiff."

In support of this second motion he filed an affidavit in which he denied that he was indebted to the plaintiff in any sum whatever, but alleged that he was indebted to the bank in the sum of about \$5,000 upon the notes

sued on in this action, and denied that the same had not been secured by any mortgage, lien or pledge upon real or personal property. He then proceeds, however, to state that he and Oppenheimer are the owners of the property referred to in his previous affidavits, and that the bank has possession thereof, claiming a lien thereon as security for the indebtedness mentioned in the complaint, and that the plaintiff is but the representative of the bank and is prosecuting this action in its interest. He then sets out the proceedings in the suit brought against him by the bank, and the evidence of the plaintiff and McElroy, its cashier, given in such suit, and concludes by saying: "I desire to state that, if it is true, as testified to by Watson and McElroy, that I transferred the said stock to the said bank, as collateral, which fact was found by the referee to be true, then it was collateral for the full amount of my said indebtedness existing at said time, of which the indebtedness herein sued upon is a part. And that, for the reason that the collateral follows the indebtedness, and for the further reason that the said Watson really holds said notes for the benefit of the bank, therefore the said bank has security for its said indebtedness, and the said Watson has security for his said claim, and this attachment ought to be set aside and held for naught." A few days later, the plaintiff, Watson, filed a counter affidavit, giving in detail a statement of the contention of the bank and of himself, the testimony given on the hearing of the equity case, and the report of the referee made and filed therein.

It is unnecessary to set out more at length the contents of these several affidavits. They show that on or about the twenty-sixth of December, 1894, the defendant was indebted to the Merchants' National Bank in a large sum of money, and the bank opened negotiations with him looking to the securing of such indebtedness; that

on or about the seventh of January, 1895, in pursuance of an agreement it thought it had with him, the bank redeemed the stock referred to in the several affidavits from Ladd & Bush, of Salem, to whom it had been pledged by the defendant as security for about \$2,000, and in this manner obtained possession thereof; that immediately thereafter the defendant denied its right to the possession, or that he had ever made an agreement that the stock might be held as collateral security for his indebtedness to the bank, and claimed that, pending his negotiations with the bank in relation to the matter, he had transferred the foundry stock to Oppenheimer to secure an indebtedness of \$15,000 due to him. A few days later, and after the defendant had denied the right of the bank to hold such stock as collateral security, the bank transferred the notes upon which this action is based to the plaintiff, its president, for collection, and he thereupon brought this action, alleging in his affidavit for the attachment that the payment of such indebtedness "has not been secured by any mortgage, lien or pledge upon real or personal property." The motion for the discharge of the attachment was allowed, and subsequently a judgment was rendered in favor of the plaintiff for the amount prayed for in the complaint, and he appeals, assigning as error the sustaining of such motion.

REVERSED.

For appellant there was an oral argument by *Mr. William T. Muir*, with a brief over the name of *Whalley & Muir*, to this effect:

We claim that the bank did not have any security, within the meaning of the attachment law, for its right to the collateral stocks was disputed by both Loewenberg

and his friend Oppenheimer. The word "secured" must mean an admitted security—not one that is denied. No claim of a pledge which must be established in a suit, and against the opposition of the supposed pledgor, is a "security."

The indebtedness of Loewenberg was in the form of five notes, and an overdraft. Four of these notes were transferred to plaintiff by indorsement, for value, without recourse, and he executed an agreement to pay to the bank the entire amount collected, less expenses, with this special clause: "I do hereby declare * * * that I accept said notes with the express understanding that I acquire no interest by said transfer in any pledge or collateral security whatever." Now, it is evident that plaintiff had no security, unless he is to be charged with it because his assignor had control of these stocks at the time the notes were indorsed, and in spite of the fact that he never had possession or control of them. It is contended that the bank had security, therefore the assignee of these notes had, under the rule that security is an accessory and follows the principal. This rule is designed to preserve the integrity and facilitate the transfer of negotiable instruments; it never was intended to impair the value of commercial paper, or affect its free negotiability. It does not become a part of the contract of pledge between the pledgor and pledgee. The complete ownership of collateral, so far as it is necessary to protect full payment of the principal debt, is in the pledgee; but the complete ownership of the principal obligation is in the payee.

The contract of pledge does not alter the contract embodied in the principal note. As between the original parties (we do not speak of third persons with equities) the principal note may be transferred with or without the pledge. In neither instance can the pledgor

complain. If the note is transferred with the security, so that the transferee receives title to both, no harm is done. The original contract of pledge contemplated this. If the transfer is made without the security, the pledgor is benefited, and the person receiving the naked note cannot complain if he agreed to so receive the note freed from the collateral. No difficulty can arise out of this branch of the case if it is remembered that the rule, the security follows the principal, arises out of the law of negotiable instruments, and not out of the contract of pledge. The depositor of collateral as security for a debt can complain of a misuse, but not of a nonuse of the paper. The rule that the note or debt is the principal and the security an accessory has never been and cannot be invoked by the original parties to a transaction. It can only be applied when a third person seeks to enforce a secured obligation which has been transferred to him without a formal assignment of or delivery of possession of the collateral, or, in some instances, when a third person claims the benefit of a security he has never received, but which by reason of his ownership of the debt he was entitled to receive.

Let us suppose that the bank owned five separate promissory notes executed by the defendant, and was in undisputed possession of this stock as collateral security for all the indebtedness. The plaintiff, at the time of receiving an assignment of the four notes now owned by him, knew of the existence of this collateral. He accepted them without recourse, and upon the express agreement that he was not to share or have any interest in the collateral. Each of these notes constituted a separate and distinct contract, governed by the law of negotiable instruments. The contract of pledge was separate and distinct. The bank sold and plaintiff bought four of these notes, without the security. Evidently, neither

plaintiff nor the bank can complain, and Loewenberg cannot object, for his collaterals are now held for about half the debt for which he deposited them. The contract of pledge was that the bank might dispose of the stock, retain the full amount of its debt, and return the surplus; more than that he could not insist upon. The claim of the defendant cannot be supported by legal reasoning. We believe it would be difficult to find any authority holding that the laws permitting an attachment, in anywise restricted the full negotiability of promissory notes.

The transfer from the bank to Watson was absolute, and passed the entire legal ownership and equitable interest. The remedy of the bank was thereafter against Watson on his obligation to it: *Sloan v. Woodward*, 25 Or. 223.

A person holding collateral security for the payment of a debt may waive the security and attach: *Libby v. Cushman*, 29 Me. 429; *Buck v. Ingersoll*, 52 Mass. 226.

On proceedings to dissolve an attachment the traverse of the averments of the plaintiff's affidavit must be explicit, direct, and complete, in like manner as an answer to a complaint in an ordinary action, and must be tested by the same rules of pleading: 1 Wade, Attach. §§ 276-279; *Hansen v. Doherty*, 1 Wash. St. 461; *Godbe-Pitts Drug Co. v. Allen*, 8 Utah, 117; *Dolan v. Armstrong*, 35 Neb. 339; *Jenkins v. Richardson*, 71 Fed. 365.

For respondent there was an oral argument by Mr. Lewis B. Cox, with a brief over the name of Cox, Cotton, Teal & Minor, to this effect:

Taking the case presented by the appellant in its most favorable view for him, we find by reference to the printed abstract the fact to be clearly established that on the seventh day of January, 1895, the Merchants'

National Bank, which then held the notes in suit, had as collateral for them and other indebtedness owing by the respondent securities worth to the bank at least \$5,000; and the two questions raised by this appeal are as to whether or not this security inhibited the appellant from taking out a writ of attachment, and whether or not the legality of the issuance of the writ can be challenged upon motion and affidavit. We present our argument in inverse order.

This case is not ruled by that of *Bank v. Mullaney*, 29 Or. 268. The facts involved in that case were that the attachment had been issued upon papers which were regular in form, upon a demand which was undeniably attachable, and where there was no objection urged as to any of the proceedings connected with the application for or issuance of the writ. The motion made to discharge the attachment was interposed by the defendant, and the sole ground suggested by him was that in the execution of the writ the officer had levied upon property which belonged to another than himself. The court correctly determined that this sort of an application would not lie, and a very sufficient reason may have been that adequate provision was made elsewhere in our statutes for the relief of the owner of the property, while the defendant in the suit had not been injured by the execution of the writ, and consequently had no grievance to prefer. In line with this decision are the cases of *Langdon v. Conklin*, 10 Ohio St. 439; *Mitchell v. Skinner*, 17 Kan. 563. The citation made by the court to Drake on Attachment should have been taken with qualifications, because a consideration of the subject then under the view of the author will show that he was treating of attachments irregularly issued. This is not a case of that character. Here the writ was improvidently issued, which is a very different thing, amounting, as it does,

to an abuse of the process of the court, which may be brought before the court by motion and affidavit, and which the court will always correct by examining into the matters alleged to constitute the abuse, in case the charge is substantiated.

A motion to dissolve supported by affidavits, bringing in matters *dehors* the record, will lie against a writ of attachment improvidently issued: Drake, Attach. (6 ed.), §§ 397-400; 1 Wade, Attach. (1 ed.), § 276; Waples, Attach. (1 ed.), p. 426; *Elliott v. Jackson*, 3 Wis. [649], 571; *Orton v. Noonan*, 27 Wis. 572; *Morgan v. Avery*, 7 Barb. 656; *Kinsey v. Wallace*, 36 Cal. 462; *Beaudry v. Vache*, 45 Cal. 3; *Gessner v. Palmateer*, 89 Cal. 89; *Fisk v. French*, 114 Cal. 400; *Lambden v. Bowie*, 2 Md. 334; *Gover v. Barnes*, 15 Md. 576; *Branson v. Shinn*, 13 N. J. L. 250; *Phillipsburg Bank v. Lackawanna Ry. Co.*, 27 N. J. L. 206; *Boyes v. Coppinger*, 2 Yeates, 276; *Jordan v. Hazard*, 10 Ala. 221.

The notes in suit had been secured by a pledge of stocks, and the affidavit for attachment was false in fact, as the affidavits of Watson and McElroy show.

The bank and appellant could make no deal between themselves for the waiver of the securities so as to clear the way for an attachment without respondent's assent: *Largey v. Chapman*, 18 Mont. 563 (46 Pac. 808).

The appellant attempts to justify his action on the score that when the bank transferred to him the notes it reserved the collateral to apply upon other demands, and consequently that the notes in suit were not secured to him. This, however, is not in accord with the statute, or the principles of law applicable to pledges. The debt was secured in whosoever hands it rested; and the question as to whether or not the holder of the debt, as between himself and his assignor, had security to which he might look, is not germane to the matter under con-

sideration. The deal between appellant and the bank was of course nothing more nor less than a mere juggle, resorted to in the interest of the bank to give it by indirection a right which it could not exercise directly. Appellant was president of the bank, took a straw assignment, instituted his action in the interest of the bank, and the bank is to get the fruits of his proceeding—apples of Sodom, however, as they will prove to be. The proposition therefore is, in reality, whether or not the Merchants' National Bank, having taken collateral for its entire indebtedness, could disassociate the collateral from its connection with any part of the indebtedness, and waiving its lien as to that indebtedness secure a new and additional lien by an attachment, while it still held the collateral to cover the balance of the debt. We do not think the court will hesitate to say that this could not be done. Certainly the bank could not clear itself of the inhibition against an attachment raised by its holding this security in any other way than by divesting itself of the collateral, and this could be accomplished only by returning it to the respondent, and his accepting it; nor could an assignee get any better right: *Largey v. Chapman* (Mont.), 46 Pac. 808.

In states having statutes like ours, the policy of the law is to require the attaching creditor to have first exhausted his security, provided it had not been rendered worthless by the act of him who deposited it: 1 Wade, Attach. § 19.

MR. JUSTICE BEAN, after making the foregoing statement of the facts, delivered the opinion of the court.

1. It appears from this statement of the case that the defendant sought to have the attachment discharged by a traverse of the facts alleged in plaintiff's affidavit.

In such case the rule is well settled that, whatever the method of procedure may be, the traversing affidavit or plea must deny every statutory ground alleged in the procuring affidavit in as direct and explicit terms as if it were an answer to a complaint, and must be tested by the same rules of pleading. "The denial of the grounds of attachment, as alleged in the affidavit," says Mr. Wade, "should be positive, clear, and explicit. Whatever be the technical mode of procedure, whether by plea in abatement, as at common law, or by a statutory pleading in the nature of a plea in abatement, as in the State of Missouri, the paper filed in the case must possess the essential features of good pleading under the Code. Where the mode was by plea in abatement, it was held that the plea would be held bad on demurrer where two distinct grounds were alleged. In this the rule of pleading at common law is followed, as such pleas are held demurrable for duplicity when two distinct matters, each of which is sufficient, are pleaded at the same time, either in abatement or in bar. But the plea in abatement in attachment suits is open to a more serious objection, where it fails to deny distinctly the allegations of the affidavit. As we have seen, a denial of some of the allegations in the allegation practically leaves those undenied for the purpose of the traverse, as though they were confessed. It will, therefore, be fatal to the plea where one of the grounds is not traversed, or even where what may be regarded as one of two phases of the same fact is passed over, without denial, though the other phase is put in issue:" 1 Wade, Attach. § 279. See, also, 3 Enc. Pl. & Prac. 78; *Hornick Drug Co. v. Lane*, 1 S. D. 129 (45 N. W. 329); *Hansen v. Doherty*, 1 Wash. St. 461 (25 Pac. 297); *Keith v. Stetter*, 25 Kan. 100; *McFarland v. Claypool*, 128 Ill. 397 (21 N. E. 587); *Bane v. Keyes*, 115 Mich. 244 (73 N. W. 230). Now,

tested by these rules, it seems clear that the traversing affidavits of the defendant are insufficient. He does not, at any time, deny the allegations of the affidavit for the writ, or allege that the indebtedness sued upon is secured. He bases his motion entirely upon the ground that the plaintiff's assignor claims that it had the right to hold certain property in its possession as collateral security for such indebtedness; and, while he does not admit the validity of such claim, his contention is that, if it is true, the attachment should be discharged. This, we think, is not a sufficient showing to justify the court in allowing the motion.

2. The statute authorizes a writ of attachment in an action on contract for the direct payment of money, and which is not secured by mortgage, lien, or pledge upon real or personal property, or, if so secured, when such security has been rendered nugatory by the act of the defendant: Hill's Ann. Laws, § 144. By this statute the creditor holding such a security is denied the right to the summary process of attachment; but it must be an admitted security, and not one the validity of which is denied by the defendant, and which can only be enforced, if at all, at the end of a lawsuit: *Porter v. Brooks*, 35 Cal. 199.

3. If the defendant in this case had admitted the claim of the bank, his motion would probably have been well taken, but this he did not do. In the first affidavit filed by him he simply shows that the bank has possession of certain property, which it claims to hold as security for the indebtedness sued on, but does not admit the validity of such claim. In the second affidavit he expressly swears that the stock never was pledged to the bank, and that it never had any lien or claim thereon whatever. It was not until after the suit brought by the bank against him had been tried out, and the find-

ings of the referee made to the effect that the bank's contention was in part true, that he ever conceded, even in a qualified way, that his indebtedness to the bank was secured; and his statement then was that, if the testimony of the witnesses in behalf of the bank, or the findings of the referee in the equity suit are true, and that the bank did in fact have the right to hold such stock as collateral security, then, and in that event, the indebtedness sued upon was secured, and the attachment ought to be discharged; although he does not admit the claim or contention of the bank. Under these circumstances, we think the showing made by him was insufficient to authorize the discharge of the attachment, and that the court erred in sustaining such motion. The judgment of the court below is therefore reversed, and the cause remanded, with directions to overrule the motion to discharge the attachment, and for such further proceedings as may be proper in the matter.

REVERSED.

Decided 19 July, 1899.

CONRAD v. PACIFIC PACKING CO.

[49 Pac. 659; 52 Pac. 1184; 57 Pac. 1021.]

1. **AMENDING DECREE ON APPEAL.**—A decree cannot be amended on motion of a party who did not appeal, since the jurisdiction of the supreme court is confined to the revising of final decisions appealed from.
2. **AMENDING RECORD AFTER APPEAL HAS BEEN PERFECTED.***—Whether a transcript in the supreme court should be amended by adding a *nunc pro tunc* order, made by the trial court after the appeal had been perfected, is considered but not decided.
3. **WHO IS AN ADVERSE PARTY TO AN APPEAL.**—A defendant whose mortgage is upheld by a decree in a suit to set aside several mortgages is a necessary party to an appeal by a co-defendant whose prior mortgage is held invalid, and must be served with notice of such appeal, under Section 537 of Hill's Ann. Laws.

*NOTE.—See *State ex rel. v. Estes*, ante, p. 197, and *Washburn v. Interstate Investment, Co.*, 26 Or. 486.

From Multnomah: HENRY E. MCGINN, Judge.

Suit by Peter Conrad and others against the Pacific Packing Co., a corporation, and others, for the appointment of a receiver, and to wind up the affairs of defendant corporation. From the decree said corporation and other defendants appealed.

A mortgagee who had not appealed filed a motion to have the decree amended as to him, which was denied; whereupon he procured a *nunc pro tunc* order in the trial court, making the desired correction, and then moved for permission to add such order to the transcript. This was not finally decided, being reserved for the final hearing, which was never reached, however, as the respondents moved for and secured a dismissal.

MOTION OVERRULED; APPEAL DISMISSED.

Decided 26 July, 1897.

ON MOTION TO MODIFY DECREE.

[19 Pac. 659.]

Mr. Jos. N. Teal for the motion.

Mr. Allan R. Joy, contra.

PER CURIAM. This is a motion by a judgment creditor of the defendant to correct a decree against it. The material facts are that plaintiffs, as stockholders, brought a suit against the Pacific Packing Company, an alleged insolvent corporation, for the appointment of a receiver, and to wind up its affairs, whereupon P. Selling and other creditors were made parties-defendant. Issues

having been joined, the evidence was taken, from which the court found that on December 17, 1892, the corporation, being the owner in fee of certain real property, executed a mortgage thereon to secure the sum of \$1,700, which was duly assigned to the defendant, Charles W. La Barre; that on December 28, 1895, P. Selling, having commenced an action against the said corporation to recover the sum of \$700, and interest, caused its property to be attached, and thereafter obtained a judgment for the amount demanded; that on February 13, 1896, the corporation executed its mortgage to one Mary Young upon certain property; that she duly assigned the same to the Commercial National Bank, and that the amount due thereon is the sum of \$3,000. And the court thereupon decreed that the property of the corporation be sold, and out of the proceeds there be paid: (1) To Charles W. La Barre, the sum of \$1,700; (2) to the Commercial National Bank, the sum of \$3,000; and (3) that the balance be distributed *pro rata* among all *bona fide* creditors of the Pacific Packing Company.

From this decree the corporation and other defendants appeal; but, after the time had elapsed for taking an appeal, Selling discovered that the lien of his judgment was made by the decree subordinate to the lien of the Commercial National Bank. He therefore moves to amend the decree, contending that the failure of the trial court to provide therein for the application of the proceeds of the sale of the property of the corporation according to its findings of fact was an inadvertent omission, and that, the cause having been brought here, this court possesses plenary power to correct the error complained of, notwithstanding his failure to take an appeal.

1. The jurisdiction of this court is restricted to the revision of the final decisions of the circuit courts brought here by appeal; and, this being so, it is evident

that the decree in this cause cannot be modified until the final hearing on the merits, and then only as to the parties to the appeal; and, inasmuch as the motion contemplates a modification of the decree in the interest of a defendant not a party to the appeal, it follows that the motion must be denied, and it is so ordered.

MOTION DENIED.

Decided 14 March, 1898.

ON MOTION TO AMEND TRANSCRIPT.

[52 Pac. 1184.]

Mr. Joseph N. Teal for the motion.

Mr. Wallis Nash, contra.

PER CURIAM. 2. This is a motion for leave to add to the transcript of the cause a *nunc pro tunc* order of the trial court, modifying the conclusions of law and the decree based thereon. It appears that said court, after the appeal was perfected, upon motion of P. Selling, a judgment creditor of defendant, made an order correcting an error in its findings and decree so as to show that the lien of Selling's judgment, first decreed to be inferior and subsequent to the lien of a mortgage held by the Commercial National Bank upon defendant's property, is in fact superior and prior thereto, and thereupon decreed a sale of defendant's property and an application of the proceeds arising therefrom in such a manner as to prefer the judgment to said mortgage. Counsel for Selling seek to have this order made a part of the transcript, contending that the court below had power,

notwithstanding the term at which the decree was rendered had expired, and that an appeal had been perfected, to amend the record so as to make it speak the truth; while counsel for appellant insists that Selling by his motion sought to correct a judicial error, and not to make the decree conform to the decision of the court; that the conclusion of law as first found by the court is one of the alleged errors of which appellant complains, and hence, after the appeal was perfected, the trial court was without jurisdiction to make the amendment. The authorities are somewhat conflicting as to the right of a trial court to amend its record after an appeal has been perfected, in view of which we deem it expedient to deny the motion, with leave, however, to reargue it upon the trial of the cause upon the merits. It is so ordered.

MOTION POSTPONED.

Decided 17 July, 1899.

ON MOTION TO DISMISS THE APPEAL.

(57 Pac. 1021.)

Messrs. Joseph N. Teal, Raphael Citron and Michael G. Munly for the motion.

Mr. Geo. G. Bingham, contra.

MR. JUSTICE MOORE delivered the opinion.

This is a motion to dismiss the appeal. One of the objects of the suit is to set aside certain mortgages executed by the defendant the Pacific Packing Company, an insolvent corporation, which, if valid, are liens upon its real property to secure the respective sums in the

order stated, and in favor of the following named defendants: (1) Charles W. La Barre, \$1,700; (2) Allen R. Joy, \$6,500; and (3) Mary Young, \$3,500. The answer alleges that Mary Young's mortgage was given to indemnify her for liability assumed as security on a note of \$3,000 executed by the corporation to the Commercial National Bank of Portland, to which the mortgage had been assigned as collateral security. No formal order was made by which said bank became a party, but it appeared by counsel, and the court finds that it submitted itself to the jurisdiction of the court. The cause being at issue, was tried, and from the evidence taken the court found that Joy's mortgage was invalid, and decreed that the real and personal property of the corporation be sold, and that the proceeds arising therefrom be applied as follows: (1) To La Barre's mortgage, the sum of \$1,700; (2) to the Commercial National Bank, \$3,000 and interest; and (3) to the other *bona fide* creditors of the corporation *pro rata*, those having securities or prior liens being first entitled to the benefit thereof. From such portions of the decree as affect the validity of Joy's mortgage, a part of the defendant's attempt to appeal, but failed to serve the notice thereof upon the Commercial National Bank or Mary Young. The respondents' motion, one ground of which is "that the notice of appeal has not been served upon all of the adverse parties," was heretofore orally overruled, with leave, however, to reargue it at the trial of the case on its merits.

3. An appeal is taken by the appellants causing a notice to be served on the adverse party: Hill's Ann. Laws, § 537. An adverse party, within the meaning of this section, is a party whose interest in relation to the judgment, or decree, appealed from is in conflict with the modification, or reversal, sought by the ap-

peal: *Lillienthal v. Caravita*, 15 Or. 339 (15 Pac. 280); *Hamilton v. Blair*, 23 Or. 64 (31 Pac. 197); *The Victorian*, 24 Or. 121 (41 Am. St. Rep. 838, 32 Pac. 1040); *Moody v. Miller*, 24 Or. 179 (33 Pac. 402); *Jackson County v. Bloomer*, 28 Or. 110 (41 Pac. 930); *Osborn v. Logus*, 28 Or. 302 (37 Pac. 456); *Stuller v. Baker County*, 30 Or. 294 (47 Pac. 294); *Alliance Trust Co. v. O'Brien*, 32 Or. 333 (50 Pac. 801). If the decree appealed from should be reversed, and one entered here restoring the lien of Joy's mortgage, it, being prior in time, would become superior in right to the lien of the Commercial National Bank, in which case the interests of the latter would necessarily be in conflict with such reversal; and, neither the bank nor its assignor having been served with the notice, it follows that the appeal must be dismissed.

APPEAL DISMISSED.

Argued 14 December, 1898; decided 23 January, 1899.

HUDDLESTON v. CITY OF EUGENE.

[43 L. R. A. 444; 55 Pac. 868.]

1. TITLE TO LAND IN PUBLIC STREETS.†—In view of Section 4184, Hill's Ann. Laws, providing that when a street is vacated the land theretofore so used shall vest in the abutting owners, the public has only an easement in such land: *McQuaid v. Portland, etc. Ry. Co.*, 18 Or. 237 and *Larkin v. Terwilliger*, 22 Or. 97, cited.
2. CHANGING ROADS INTO STREETS—ADDITIONAL SERVITUDE.*—The conversion of a county road into a city street does not impose an additional servitude on the land occupied by the road, requiring additional compensation to be made to the owner of the fee, under the State Constitution, Article I, § 18, prohibiting the taking of private property for public use except on payment of a just compensation to the owner.

†NOTE.—On this subject see note to *Chicago, etc. Ry. Co. v. Milwaukee, etc. Ry. Co.*, 60 Am. St. Rep., p. 142 (37 L. R. A. 856); *People v. Foss*, 20 Am. St. Rep. 537.

*See the following cases on the question What Use of a Street or Highway Constitutes an Additional Servitude for which Compensation must be made.

CITY STREET RAILWAYS.—*State ex rel. v. Trenton Pass. Ry. Co.*, 3 L. R. A. 129; *Taggart v. Newport St. Ry. Co.*, 7 L. R. A. 205; *East End Ry. Co. v. Doyle*, 9 L. R. A. 100, 17 Am. St. Rep. 983; *Koch v. North Avenue R. R. Co.*, 15 L. R. A. 377;

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3. **PIPES AND SEWERS NOT A NEW SERVITUDE.**—The use of a street for laying pipes, and constructing drains, sewers, and culverts, does not impose an additional servitude on the land, so as to prevent the conversion of a public road into a city street without additional compensation to the owner of the fee.
4. **STREET IMPROVEMENT NOT A NEW SERVITUDE.**—The fact that adjacent property is liable to assessment for maintaining and improving the street does not constitute an additional servitude for which additional compensation must be made as a condition of changing a country road into a city street.
5. **EMINENT DOMAIN.**—Prescribed proceedings for condemning private property for public use must always be strictly pursued.
6. **CHARTER OF EUGENE.**—Sections 90 and 98 of the charter of the City of Eugene (Laws, 1889, p. 273), construed.

From Lane: J. C. FULLERTON, Judge.

This is a suit by S. A. Huddleston, to enjoin the Marshal of the City of Eugene from selling certain real property to satisfy an assessment for an alleged street improvement. The material facts are that plaintiff, as executrix of the last will and testament of James Huddleston, deceased, is entitled to the possession of a tract of agricultural land, upon the north side of which the County Court of Lane County located and constructed a county road; that subsequent to the establishment of said road the legislative assembly passed an act incorporating the City of Eugene, whereby said premises were

Note in 17 L. R. A. p. 477; *Gans Mfg. Co. v. St. Louis, etc. R. R. Co.*, 18 L. R. A. 330, 35 Am. St. Rep. 706; *Note* in 16 Am. St. Rep. p. 613; *State ex rel. v. Jersey City*, 26 L. R. A. 281; *Chicago & Cal. R. R. Co. v. Whiting, etc. St. R. R. Co.*, 26 L. R. A. 337, 47 Am. St. Rep. 264; *Rafferty v. Central Trac. Co.*, 30 Am. St. Rep. 763; *Pennsylvania R. R. Co. v. Montgomery Pass. Ry. Co.*, 27 L. R. A. 766, 46 Am. St. Rep. 659; *Green v. City Ry. Co.*, 44 Am. St. Rep. 238; *C. B. & Q. R. R. Co. v. West Chicago R. R. Co.*, 29 L. R. A. 485; *Taylor v. Portsmouth St. Ry. Co.*, 64 Am. St. Rep. 216; *Zehren v. Milwaukee Elec. Ry. Co.*, 67 Am. St. Rep. 844, 41 L. R. A. 575.

ELECTRIC SUBURBAN FREIGHT AND PASSENGER RAILWAYS.—*Pennsylvania R. R. Co. v. Montgomery Pass. Ry. Co.*, 46 Am. St. Rep. 659, 27 L. R. A. 766; *Chicago & N. W. Ry. Co. v. Milwaukee & Racine Ry. Co.*, 60 Am. St. Rep. 142, 37 L. R. A. 856.

POLES FOR ELECTRIC RAILWAYS.—*Taggart v. Newport St. Ry. Co.*, 7 L. R. A. 205; *State ex rel. v. Jersey City*, 26 L. R. A. 283; *State ex rel. v. Trenton Pass. Ry. Co.*, 33 L. R. A. 129.

STEAM COMMERCIAL RAILROADS.—*Adams v. Chicago, B. & N. R. R. Co.*, 12 Am. St. Rep. 64, 1 L. R. A. 493; *Theobald v. Louisville, etc. Ry. Co.*, 14 Am. St. Rep.

included therein (Laws 1889, p. 273); that the common council of said city, deeming it expedient to lay out a street and establish the grade thereof upon the line of said road, attempted to do so in the manner prescribed in section 90 of said act, but failed to comply strictly with its provisions. An ordinance was passed and approved, in pursuance of which said street was graded and graveled, and a strip of said land, one hundred and twenty-eight rods in length, and one hundred and sixty feet in width, adjoining the same, was assessed for the improvement in the sum of \$315.02, and the amount thereof entered in the docket of city liens; but, the assessment becoming delinquent, a warrant for its collection was issued, and the marshal, obeying the command thereof, levied upon and threatened to sell the premises assessed, to prevent which this suit was instituted. The cause being at issue, was referred to A. C. Woodcock, Esq., who took the evidence, from which he found, in substance, that notwithstanding the council had not complied with the provisions of section 90, *supra*, in establishing said street, section 98 of the charter authorized it to change the road into a street, and provided that, when so changed, jurisdiction thereof should be thereupon transferred from the county to the city, and recom-

564, 4 L. R. A. 739; *Lamm v. Chicago, St. P. & O. R. R. Co.*, 10 L. R. A. 268; *Nichols v. Ann Arbor & Y. R. R. Co.*, 16 L. R. A. 371; *Note*, 16 Am. St. Rep. at p. 612; *Western & A. Ry. Co. v. Alabama, etc. Ry. Co.* 17 L. R. A. 474; *White v. Northwest, etc. R. R. Co.*, 22 L. R. A. 625, 37 Am. St. Rep. 639; *Gustavson v. Hamm*, 22 L. R. A. 565; *Montgomery v. Santa Ana Ry. Co.*, 25 L. R. A. 654, 43 Am. St. Rep. 89.

ELEVATED STREET RAILROADS.—*Pond v. Metropolitan Elev. Ry. Co.*, 8 Am. St. Rep. 734; *Abendroth v. Manhattan Ry. Co.* 11 L. R. A. 634, 19 Am. St. Rep. 461; *Kane v. New York Elev. Ry. Co.*, 11 L. R. A. 640; *Selden v. City of Jacksonville*, 14 L. R. A. 370, 29 Am. St. Rep. 278; *Moore v. New York Elev. Ry. Co.*, 14 L. R. A. 731; *Koch v. North Avenue R. R. Co.*, 15 L. R. A. 377; *Doane v. Lake St. Elev. Ry. Co.*, 36 L. R. A. 97, 56 Am. St. Rep. 275.

TELEGRAPH AND TELEPHONE POLES.—*American Telephone Co. v. Smith*, 7 L. R. A. 200; *Note*, 16 Am. St. Rep. at p. 614; *Western Union Telegraph Co. v. Williams*, 19 Am. St. Rep. 908, 8 L. R. A. 428; *Stowers v. Postal Telegraph Co.*, 24

mended that the temporary injunction theretofore issued be dissolved and the suit dismissed. The court approved the report, and gave a decree in accordance therewith, from which plaintiff appeals.

AFFIRMED.

For appellants there was an oral argument and a brief by *Messrs. L. Bilyeu and Joshua J. Walton*, urging these points :

A highway or county road is not a street.

To change a county road into a street will add new and increased expenses to the highway, and subject the land of the owner to other and greater servitudes. This additional servitude is property : *Dyckman v. New York*, 5 N. Y. 439 ; *Philadelphia v. Dickson*, 38 Pa. 249 ; *Heiple v. East Portland*, 13 Or. 97.

A municipal corporation has no inherent or implied power in the nature of eminent domain to condemn lands, or any interest, right or title therein, or to condemn any property rights for local improvements : *Philadelphia v. Dickson*, 38 Pa. 249 ; *Water Works Co. of Indianapolis v. Burkhart*, 41 Ind. 364 ; *State, Durant v. Jersey City*, 25 N. J. L. 310 ; *Harbeck v. Toledo*, 11

Am. St. Rep. 220, 12 L. R. A. 864 ; *Eels v. American Telephone Co.*, 25 L. R. A. 640 ; *People v. Eaton*, 24 L. R. A. 721 ; *Chesapeake Telephone Co. v. MacKenzie*, 28 Am. St. Rep. 219 ; *Cater v. Northwestern Telephone Co.*, 51 Am. St. Rep. 543, 28 L. R. A. 310 ; *Pacific Postal Telegraph Co. v. Eaton*, 62 Am. St. Rep. 390, 39 L. R. A. 722 ; *Magee v. Overshtner*, 40 Am. St. Rep. 370, 65 Am. St. Rep. 358.

SEWERS AND DRAINS.—Note in 17 L. R. A. at p. 479.

WATER AND GAS PIPES AND PIPE LINES.—Note in 17 L. R. A. at p. 490 ; *Kincaid v. Indianapolis Gas Co.*, 19 Am. St. Rep. 113, 8 L. R. A. 802 ; *Huffman v. State*, 69 Am. St. Rep. 368.

MARKETS.—Notes in 16 Am. St. Rep. at p. 614, and 17 L. R. A. at p. 486.

MISCELLANEOUS.—Note in 17 L. R. A. at p. 481.

—REPORTER.

Ohio St. 219; *People v. Brighton*, 20 Mich. 57; *Sheldon v. Kalamazoo*, 24 Mich. 383; *Heiple v. East Portland*, 13 Or. 97.

As a county road the property of the plaintiff was not liable to the assessment tax and burden now sought to be enforced, and to make it so liable it must become a street.

For respondent there was a brief over the names of *Geo. B. Dorris* and *E. R. Skipworth*, with an oral argument by *Mr. E. R. Skipworth*.

The entire extension of Eighth Street and the establishment of Blair Street was upon, along, and within a county road within the corporate limits of the City of Eugene. There being no taking of property in this case, and no damages to appellant, she cannot be heard to complain: *Elliott, Roads & Streets*, pp. 315, 316; *Springfield v. Connecticut River R. R. Co.*, 4 Cush. 72; *West Boston Bridge v. Middlesex County Comrs.*, 10 Pick. 272; *East Portland v. Multnomah County*, 6 Or. 62; *Multnomah County v. Sliker*, 10 Or. 65.

Where a new highway (street) is proposed to be established or laid out, notice, etc., must be given, for the reason there is a taking of private property for public use, and therefore damages, hence section 90 of the city charter of 1889, and when there is no taking and no damage the converse is true, hence section 98: 1 *Dillon, Mun. Corp.* § 71; 2 *Dillon, Mun. Corp.* §§ 680, 681; *Barnes v. District of Columbia*, 91 U. S. 540, 23 L. ed. 440.

Whenever the legislature incorporates a city, or extends the corporate limits of a city, public roads or public highways are included in said incorporation or extension, and, such being the case, eminent domain was, at the time of laying out said roads or highways, duly exercised,

and all the forms of law complied with : *Sutherland*, Stat. Constr. § 240 ; *Foster v. Collner*, 107 Pa. 305 ; *State ex rel. Blinebury v. Mann*, 21 Wis. *685 ; *Chapman v. Miller*, 128 Mass. 269 ; *Elliott, Roads & Streets*, pp. 313, 315, 316 ; *Springfield v. Connecticut River R. R. Co.*, 4 Cush. 72 ; *West Boston Bridge v. Middlesex County Comrs.*, 10 Pick. 272 ; *East Portland v. Multnomah County*, 6 Or. 62 ; *Multnomah County v. Sliker*, 10 Or. 65.

Agricultural lands within the corporate limits of a city can be made to respond for street assessments the same as other property within the city : 2 *Dillon, Mun. Corp.* § 795 ; *Charter of the City of Eugene*, 1893, §§ 67, 74 ; 15 *Am. & Eng. Enc. Law* (1 ed.), p. 1013 ; *Linton v. Athens*, 53 Ga. 588 ; *Martin v. Dix*, 52 Miss. 53 (24 *Am. Rep.* 661) ; *Barker v. State*, 18 Ohio, 514 ; *Kelly v. Pittsburgh*, 85 Pa. 170 (27 *Am. Rep.* 633).

MR. JUSTICE MOORE, after stating the facts, delivered the opinion of the court.

It is contended by plaintiff's counsel that the public has an easement only in a county road, while a qualified fee in the street is dedicated to, or condemned for, the public use ; that a county road is laid out, built, and kept in repair by taxes collected from residents of the whole taxing district, and from property situated therein, while a street is usually established and improved by assessing the real property abutting thereon, and hence changing a county road into a city street imposes upon the premises claimed to have been improved additional burdens, and that this supplemental servitude constitutes private property, the taking of which for a public use is prohibited by the organic law of the state, except upon the payment of a just compensation (Const. Article I, § 18) ; that the power of a municipal corporation to exercise the

right of eminent domain will not be implied, and, while section 98 of the charter authorizes the council to establish a street upon said county road, this can be done only by strictly pursuing the mode prescribed in section 90 of the act of incorporation, which is the measure of its power, but, the council having failed to observe such requirements, jurisdiction to improve said road was never acquired, and hence the assessment is void, and the court erred in dismissing the suit. It is maintained by defendant's counsel, however, that section 90 applies only in cases where a street is to be established over premises where no highway theretofore existed, and, it being admitted that no additional land was appropriated by changing the road into a street, plaintiff sustained no injury in consequence thereof, and hence compliance with the requirements of said section was unnecessary.

The provisions of the charter to which reference has been made are as follows :

"Sec. 90. Whenever the council shall deem it expedient to open, lay out, establish, widen, straighten or extend a street or alley, it shall cause the city surveyor to survey such proposed new street or extension or line to which the width is to be changed or straightened, and make a report thereof containing a plat of the survey of such street or alley, of the portion of each lot or part thereof required to be appropriated for such street or alley, which report, if satisfactory to the council, shall be adopted by an ordinance embodying the same; *provided*, that before the adoption thereof, the recorder shall give notice of the filing of such report by publication for two weeks in some newspaper published in the City of Eugene, or by written notices posted for two weeks at three public places in said city, and at the next meeting of the council, after the expiration of such notice, present to it the said report, and attached thereto a copy

of such notice, with the proof of publication or posting indorsed thereon. Thereafter, and within thirty days from the adoption of such report, the council shall appoint three disinterested freeholders of the City of Eugene, no kin to any owner or person interested in any property to be appropriated, and possessing the qualifications of jurors in courts of justice in this state, to view such proposed street or alley, and make an assessment of the damages, if any, to the respective owners of the lots and parts of lots appropriated, and to report the same to the council. The said viewers shall meet at such time as may be designated by the council, and after having been duly sworn or affirmed to discharge their duties faithfully, shall proceed and view the whole distance of said proposed street or alley and ascertain and determine how much less valuable the premises of such owners, respectively, would be rendered by the opening of the same. If the council is satisfied that the amount of damages assessed by said viewers, or by the circuit court, upon appeal, as hereinafter provided, is just and equitable, and that the proposed street or alley will be of sufficient importance to the public to cause the damages so assessed and determined to be paid by the city, the council shall order the same to be paid to the said owners, respectively, out of the treasury as other claims against the city are paid; but if in the opinion of the council such street or alley is not of sufficient importance to the public to cause the damage to be paid by the City of Eugene, the council may refuse to open such street or alley, or extend or widen the same, as the case may be, unless the damages, or such part thereof as the council may think proper, shall be paid by private parties."

"Sec. 98. The common council has authority and is hereby authorized, when it shall deem it expedient, to

open, establish and locate streets upon the road-bed of, and upon or across any county road or public highway within the corporate limits of the City of Eugene; and when so located or established, said county roads or public highways shall be and become public streets of said city and subject to jurisdiction and control of the council the same as other streets."

It was virtually conceded at the hearing by counsel for the respective parties that if it was necessary to pursue the method prescribed in section 90, in order to establish a street upon the line of the county road, the means adopted were ineffectual to confer jurisdiction.

1. An important question to be considered is whether a change, by authority of the legislative assembly, of a county road to a city street, imposes an additional servitude upon the real property over which the highway is constructed. In *Lankin v. Terwilliger*, 22 Or. 97, it is held that by the location of a county road the public only acquires an easement in the land, while the fee remains in the owner, and when the road is vacated by public authority, the land immediately reverts to the owner, freed from the easement. The heirs of James Huddleston, deceased, therefore, had a reversionary interest in the land over which the highway was located; and plaintiff, by reason of her trust, was entitled to the possession thereof when the road should be vacated by proper authority: *Phillips v. Dunkirk R. R. Co.*, 78 Pa. 177. The statute regulating the recording of town plats, and vacating streets provides, in general terms, that when a town is laid out the proprietor must record the plat thereof in the recorder's office in the county in which the same is situated: Hill's Ann. Laws, § 4178. Every donation or grant to the public of a street marked as such on said plat shall be considered to all intents and purposes as a general warranty to the donee, or grantee, for the uses

and purposes intended by the donor, or grantor: Id. § 4180. When a street is vacated, the land theretofore used as a highway shall be attached to the lots or ground bordering on such street, and all right or title thereto shall vest in the person, or persons, owning the property on each side thereof in equal proportion, according to the length or breadth of such lots or ground, as the same may border on such street: Id. § 4184. In *McQuaid v. Portland Ry. Co.*, 18 Or. 237 (22 Pac. 899), it is held that the fee of a street is either in the adjacent lot owner, or remains in the dedicator. Mr. Chief Justice THAYER, considering section 4180, *supra*, in deciding the case, and discussing the effect of a dedication or condemnation of a street, says: "The public may have an irrevocable right to the use of the street, but how can it acquire the fee to the land? The fee must vest in some one having a legal capacity to take it. It must be a natural or artificial person—must be some one having a legal entity. The declaration that the fee in such case is in the public, meaning the general mass of the people, without regard to any legal organization, although often made use of, is, to my mind, absolutely absurd. The public, as a mass, does not, in my opinion, possess any such capacity." While the question considered in that case was not deemed very important, the reasoning convinces us that the public acquires only an easement in a street which has been dedicated or condemned for its use. The interest of the public in a street or road being an easement only, the title to the fee was not changed by converting the road into a street, and hence no necessity existed for acquiring a right which the public already enjoyed: *People v. Kerr*, 27 N. Y. 188.

2. The public easement in a county road is limited to the uses to which such a highway is commonly subjected, and it must be presumed that the condemnation of the

land for such road by the county court was made with reference to such uses. The road was undoubtedly established over the particular route selected to promote travel between objective points, thereby facilitating the transportation of passengers and property by the mode in vogue when the highway was adopted. The imposition of a new servitude upon the land, in addition to and distinct from that to which it was originally subjected when taken for a highway, the obstruction of the abutting proprietor's access to the street, or the impairment of his right to light and air, constitutes a taking of private property for a public use, within the meaning of the fundamental law of the state, for which compensation must be made for the damages which necessarily ensue: *Cooley*, Const. Lim. *557; *Elliott*, Roads & S. 155; *Willamette Iron Works v. Oregon Ry. & Nav. Co.*, 26 Or. 224 (29 L. R. A. 88, 37 Pac. 1016, 46 Am. St. Rep. 620); *Imlay v. Union Branch R. R. Co.*, 26 Conn. 249 (68 Am. Dec. 392); *Milhau v. Sharp*, 15 Barb. 193; *Story v. New York Elevated R. R. Co.*, 90 N. Y. 122 (43 Am. Rep. 146); *State v. Laverack*, 34 N. J. L. 201; *Heard v. City of Brooklyn*, 60 N. Y. 242; *Strong v. City of Brooklyn*, 68 N. Y. 1. The ordinary mode of travel in cities at the present time is the same as that in vogue in the rural districts when the road was established. The use of the highway as a street will not be in addition to or distinct from that originally appropriated, and hence the conversion of the road into a street does not constitute a taking which demands additional compensation therefor on account of such use: *Williams v. New York Central R. R. Co.*, 18 Barb. 222; *Fagan v. City of Chicago*, 84 Ill. 227.

"The legislature of the state," says Judge Dillon in his work on Municipal Corporations, 3 ed., § 656, "rep-

resents the public at large, and has * * * full and permanent authority over all public ways and public places." In *Portland, etc. R. R. Co. v. Portland*, 14 Or. 188 (58 Am. Rep. 299, 12 Pac. 265), it is held that an act of the legislative assembly granting the use of a public levee of the City of Portland for railway purposes was a valid exercise of the lawmaking power. Mr. Chief Justice LORD, in rendering the decision, says: "The interest in the use of the streets and highways and public places, and their uses, being *publici juris*, the power of regulating such use is in the legislature, as the representative of the whole people." To the same effect, see *East Portland v. Multnomah County*, 6 Or. 62; *Multnomah County v. Sliker*, 10 Or. 65. The legislature has plenary power to delegate to a municipal corporation or other agency the right to lay out, establish and open highways for public use, and may also change its trustees, and impose upon the substituted instrumentality the duty of keeping such highways in repair: *Simon v Northup*, 27 Or. 487 (30 L. R. A. 171, 40 Pac. 560); *Little Nestucca Toll Road Co. v. Tillamook County*, 31 Or. 1 (65 Am. St. Rep. 802, 48 Pac. 465). Judge Elliott, in his work on Roads and Streets (p. 313), in speaking of the effect of the incorporation of a city upon the highways therein established by county authority, says: "Where there is no statute, the incorporation of a city seems naturally to imply that the highways within its territorial limits become streets, and, as such, subject to the control of the municipality. The erection of such a corporation is, in truth, simply the creation of a new instrumentality of government; it comes into existence with the rights, powers and duties of a governmental subdivision; and it is but reasonable to conclude that as to such matters as streets, which peculiarly pertain to municipal corporations, the authority of other gov-

ernmental corporations is excluded." In *McGrew v. Stewart*, 51 Kan. 185 (32 Pac. 896), the limits of a city were extended so as to include territory upon which a public highway existed. After the extension of the city boundaries, the council caused a sidewalk to be built along the highway, and assessed the cost thereof against the abutting property; and, in a suit to enjoin the collection of the assessment, it was held that upon the annexation of the territory the highway was impressed with the character of a street, and became subject to the exclusive control of the city authorities, and to the liabilities and servitudes of all other streets within the city. To the same effect, see 15 Am. & Eng. Enc. Law (1 ed.), p. 1017; *Cowan's Case*, 1 Overt. 311; *McCullom v. Black Hawk County*, 21 Iowa, 409; *Clark v. Commissioners*, 14 Bush, 166; *Ottawa v. Walker*, 21 Ill. 605 (71 Am. Dec. 121). Section 98 of the charter, however, shows that the County Court of Lane County was not divested of jurisdiction of the road, notwithstanding the incorporation of the city, until the council deemed it expedient to establish a street over it. In *State v. Jones*, 18 Tex. 874, it is held, under a similar provision contained in a charter, that until the council acts under the power conferred, the general authority of the county court over the subject-matter continues to exist, and may be exercised.

3. It is argued that the uses to which streets are ordinarily put are greater and more numerous than those to which a county road is subjected, and particularly so with reference to the laying of pipes and the construction of drains, sewers, and culverts in streets: 2 Dillon, Mun. Corp., § 688. But Judge Elliott, in his work on Roads and Streets (p. 311), anticipating such contention, says: "Where land is dedicated or appropriated for a suburban road, the implication must be that it shall be used as the

convenience and welfare of the public may demand, although that demand may be augmented by the increase in population, or by a town or city springing up in the territory traversed by the road." In *Malone v. Toledo*, 28 Ohio St. 643, a strip of land one hundred feet wide in the City of Toledo was appropriated for use as a canal, Thereafter this strip was transferred by the state to said city in pursuance of an act of the legislature which authorized the city to enter upon, improve, and occupy said premises as a public highway, and for the use of water pipes for sewerage purposes. In a suit, by one claiming to own a portion of said tract, to enjoin the city from interfering with his possession, it was held that, a canal and street being public highways, the uses of either were of a public nature and of a like kind, and that the use of the canal for water pipes and sewers was not inconsistent with that to which it had been originally applied. To the same effect, see *Crooke v. Flatbush Water Works Co.*, 29 Hun. 245; *Cummins v. Seymour*, 79 Ind. 491 (41 Am. Rep. 618).

4. The change of a road to a street renders the adjacent property liable to assessment for improvement to which it was not exposed under existing law prior to the change, and this presents the question whether such burden constitutes an additional servitude, for which compensation must be made. Mr. Mills, in his work on Eminent Domain (§ 34), says: "A change from a highway to a turnpike charging toll is not such an essential change as to require compensation to adjoining owners. When a highway is taken for a turnpike, it does not cease to be a highway, and the land does not revert to the owner. The payment of tolls to the turnpike company is in lieu of payment of taxes to support the road. The change is only a change of mode in sustaining the road, and not a change of use." See, also, Elliott,

Roads & S. 161; Cooley, Const. Lim. *546; *Benedict v. Goit*, 3 Barb. 459; *Walker v. Caywood*, 31 N. Y. 51; *Wright v. Carter*, 27 N. J. L. 76; *Douglass v. Boonsborough Turnp. Co.*, 22 Md. 219 (85 Am. Dec. 647); *Callison v. Hedrick*, 15 Gratt, 244; *Panton Turnp. Co. v. Bishop*, 11 Vt. 198; *Carter v. Clark*, 89 Ind. 238; *Chagrin Falls Road Co. v. Cane*, 2 Ohio St. 419; *Malone v. Toledo*, 28 Ohio St. 643; *Commonwealth v. Wilkinson*, 16 Pick. 175 (26 Am. Dec. 654); *Murray v. Berkshire County Comrs.*, 12 Met. (Mass.) 455. The right to compensation being founded upon a change in the use, and not upon an alteration in the manner of maintaining the highway, the assessment of benefits for the improvement of the street does not constitute such an additional taking of private property for public use, within the meaning of the organic act, as to necessitate compensation therefor. To hold that plaintiff is entitled to compensation by reason of the change in the method of keeping the highway in repair would be equivalent to maintaining that the legislative assembly could not alter the mode of collecting road taxes after the highway was once established—a mere statement of which shows the fallacy of the argument. Judge Elliott, in his work on Roads and Streets (p. 315), in discussing this subject, says: "If we have not reasoned ill, a suburban servitude may not only be greatly augmented, but, in a measure, transformed, by the demand of the public welfare. This conclusion has for its ultimate foundation the old maxim, 'That regard be had for the public welfare is the highest law,' and it receives support from the principle that men are presumed, when they do an act, to contemplate the natural consequences which may result. It is also true that the benefit which the owner of the servient estate receives from the increase in population and the building up of cities far more than compensates him for the increased

burden of the servitude which these things produce, so that he suffers no damages, and without damages there can be no right of action."

5. The rule is well settled that the remedy prescribed by statute for the condemnation of private property for a public use must be strictly pursued, or the appropriation may be enjoined; for no prerogative of sovereign power should be watched with greater vigilance than that which takes the property of the individual, and devotes it to a public use: *Decatur County Commissioners v. Humphrey*, 47 Ga. 565; *Dyckman v. New York*, 5 N. Y. 434.

6. In the light of this rule, we will examine sections 90 and 98 of the charter, to ascertain, if possible, the legislative intent with reference to the manner to be pursued by the council in changing a road to a street. It will be remembered that section 90 requires the council to "cause the city surveyor to survey such proposed new street, or extension, or line to which the width is to be changed or straightened;" thereby impliedly, at least, declaring it to be unnecessary to survey a public road already in existence within the limits of the city, since such highway, on being changed from a road to a street, is not thereby rendered a "new" street to be opened or widened, a "new" extension to be laid out or established, or a "new" line. Section 98 authorizes the council "to open, establish, and locate streets upon the roadbed of, and upon or across any county road or public highway within the corporate limits of the City of Eugene;" and construing, as we must, sections 90 and 98 *in pari materia*, it is quite apparent that the legislative assembly intended that the provisions of section 90, *supra*, should only be invoked when a "new" street is to be opened or widened, a "new" extension to be laid out, or a "new" line established, except when, in changing from a road to a street, addi-

tional property is required to be appropriated, or a new use is to be imposed upon the right already acquired. In the change made, no more land was taken, no different title acquired, and no alteration in the use effected; and, such being the case, the legislative assembly was not obliged to provide for a new condemnation, in view of which we are led to believe that the council, by adopting the ordinance referred to, accepted the terms of the grant, and changed the road into a street, under the provisions of section 98, and that section 90 relates to the opening of streets where no highway theretofore existed, or where a material change in the use is contemplated, and that the attempt in the case at bar to pursue the method prescribed in section 90 was unnecessary; and hence the decree is affirmed.

AFFIRMED.

Argued 19 December, 1898; decided 30 January, 1899.

LONG v. THOMPSON.

[55 Pac. 978.]

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1. ABATEMENT OF APPEAL BY DEATH OF PARTY—SUBSTITUTION.—Death of a party pending appeal does not abate the appeal, notwithstanding no application for a substitution was made within a year, as required by Section 38, Hill's Ann. Laws, the statute not applying where death occurs after an appeal has been perfected.
2. JUSTICE OF THE PEACE—VACATING JUDGMENT.—An error of a justice of the peace in requiring plaintiff to give an additional undertaking for costs and disbursements, after he had already made a deposit for that purpose, is not a sufficient ground for vacating by writ of review the justice's judgment rendered after a trial on the merits.
3. PLEADING—WAIVER OF OBJECTION—REVIEW.—Where trial was had in a justice's court, without objection, on an answer purporting to deny the material allegations of the complaint, it cannot be afterwards urged on writ of review that the answer was insufficient: *Minard v. McBee*, 29 Or. 225, cited.
4. REVIEW OF JUDGMENT OF JUSTICE'S COURT.—The neglect of a justice of the peace to pass upon objections made by a party to a cost bill affords no ground for vacating and setting aside the justice's judgment upon a writ of review.

5. EFFECT OF INSTRUCTING THE JURY IN JUSTICE'S COURT.—The assumption by a justice of the peace of the right to instruct the jury in a case on trial before him, even if unauthorized, does not affect his jurisdiction, nor afford sufficient ground for disturbing his judgment on a writ of review.

From Douglas : J. C. FULLERTON, Judge.

Writ to review a judgment of a justice of the peace. The circuit court quashed the judgment, and the defendant appealed.

REVERSED.

For appellant there was a brief over the name of *E. D. Stratford*, with an oral argument by *Messrs. Andrew M. Crawford* and *O. P. Coshow*.

For respondent there was a brief over the name of *L. Loughary*, with an oral argument by *Messrs. Byron & Long*, and *S. T. Richardson*.

MR. JUSTICE BEAN delivered the opinion.

This is an appeal from a judgment vacating and annulling, on writ of review, a judgment of a justice's court. The facts, as disclosed by the return to the writ, are that on June 22, 1895, the respondent, John Long, commenced an action against the appellant, L. T. Thompson, in the Justice's Court for Calapooia Precinct, Douglas County, to recover possession of certain described personal property of the alleged value of \$12, by filing a complaint therein, and causing a summons to be issued thereon. At the hour fixed for the return of the summons, plaintiff, Long, as the justice's docket discloses, deposited with the court \$50 in money "as costs for court and officers" in such action, and thereafter, and before the filing of the answer, on the application of the defendant, Thompson, the justice made an

order requiring the plaintiff to give an undertaking in the sum of \$50 for costs and disbursements of the action, as provided in Section 2062, Hill's Ann. Laws, which was done accordingly. An answer was then filed, and a trial had before a jury, resulting in a verdict and judgment in favor of defendant, whereupon he filed a bill for his costs and disbursements amounting to \$215.95. Objections were subsequently filed to two or three small items included therein, but the entire amount appears to have been allowed by the justice, and a judgment entered therefor. This proceeding was thereupon instituted, which resulted in a judgment vacating and setting aside the judgment and proceedings of the justice's court.

1. After an appeal to this court had been taken, and pending the determination thereof, the plaintiff died, and it is now contended that, as no application for a substitution was made within a year after his death, the appeal abated, and ought to be dismissed. This argument is based on Section 38 of the Code of Civil Procedure, which provides that no action shall abate by the death, marriage, or other disability of a party, or by the transfer of any interest therein, if the cause of action survive or continue, but the court may, at any time within one year thereafter, on motion, allow the action to be continued by or against his personal representative or successor in interest. Under this section the motion for a substitution must be made within a year after the death (*Dick v. Kendall*, 6 Or. 166; *Barker v. Ladd*, 3 Sawy. 44, Fed. Cas. No. 990; *In re Bainbridge*, 67 Barb. 293), but it is believed that the statute does not apply to parties whose death occurs after an appeal has been perfected. There is a material distinction at common law between the death of parties before and after an appeal has been taken and while it is pending. In the

former case, as a general rule, the action abated, and it therefore required the aid of some statute like our section 38 to enable it to be continued by or against the personal representatives of deceased parties. But in cases of appeals or writs of error from judgments already rendered a different rule prevailed, and in no case did such appeal or writ of error abate by the death of the sole respondent or defendant in error, whether it happened before or after the cause had been submitted, if the cause of action survived. In such case, if the personal representatives of the respondent failed to obtain an order of substitution, the appellant was entitled to have them made parties by a proper proceeding. Such is the doctrine of the approved common law authorities (2 Tidd, Prac. *1163; *Green v. Watkins*, 19 U. S. (6 Wheat.) 260; *Hutchcroft's Executor v. Gentry*, 2 J. J. Marsh, 499; *Carroll v. Bowie*, 7 Gill, 34); and it is believed this rule is not changed by our statute (*Prior v. Kiso*, 96 Mo. 315, 9 S. W. 898). So that, notwithstanding the death of the respondent, Long, pending the determination of this appeal, the case is still here, and the appellant is entitled to have his representative substituted therefor. And this brings us to the merits of the appeal.

The alleged errors, as assigned in the petition for the writ of review, are: (1) The action of the justice in requiring the plaintiff to give an additional undertaking for costs and disbursements after he had already deposited \$50 for that purpose; (2) in not rendering judgment in favor of plaintiff on account of the insufficiency of the answer; (3) in assuming to instruct the jury as to the law by which they should be governed in arriving at their verdict; and (4) in not passing upon or determining the objections made by the plaintiff to the cost bill.

2. It is perhaps a sufficient answer to the first objection to say that the record does not show that the undertaking for costs and disbursements was in addition to a deposit of \$50 for the same purpose. The minutes of the justice's docket recite that the \$50 were deposited by the plaintiff "as costs for court and officers;" but whether made voluntarily, or on the application of the defendant, or upon the court's own motion, does not appear. But, be that as it may, it would not furnish sufficient grounds for vacating the judgment of the justice's court rendered after a trial of the issues between the parties, even if the court had erred in requiring the plaintiff to give two separate undertakings for costs and disbursements in the action.

3. The second objection is also without merit. The answer in the justice's court purports to deny the material allegations of the complaint, and a trial was had thereon before a jury, without objection, on the theory that it presented an issue; and whether it is technically sufficient for that purpose is, therefore, not at all material at this time: *Minard v. McBee*, 29 Or. 225 (44 Pac. 491).

4. So, also, with reference to the alleged neglect of the justice to pass upon some objections made by the plaintiff to the cost bill. As to what disposition was made of such objections the record of the justice's court is silent, unless the fact that the costs were allowed to the full amount claimed is an indication that they were overruled or withdrawn. But, however this may be, it affords no reason for vacating and setting aside the judgment of the justice's court.

5. It is unnecessary to enter upon a consideration of the question as to whether a justice of the peace, under our statute, is authorized to instruct the jury in a case on trial before him, because, at most, his assuming to

do so was but an irregularity, which did not affect the jurisdiction of the court, nor afford sufficient ground for disturbing the judgment on a writ of review.

It follows from these views that the court below was in error in vacating and annulling the judgment of the justice's court, and that the motion for the substitution as respondents of the personal representatives of Long must be allowed, the judgment reversed, and the cause remanded, with instructions to dismiss the writ.

REVERSED.

Argued 15 December, 1896; decided 30 January, 1899.

DENNY v. SEELEY.

[55 Pac. 976.]

1. RELATION OF PRINCIPAL AND SURETY.—Where one who is not personally responsible as a surety pledges his property to secure the debt or default of another, such property becomes a surety or guaranty for the principal debtor, and any act of the creditor that would discharge a personal surety will relieve the property: *Gray v. Holland*, 9 Or. 512, cited.
2. RELEASE OF SURETY.*—A surety is released only *pro tanto*, where the creditor, without his consent, releases some property which was intended by the debtor as security, or where, by the gross carelessness of the creditor, such property is lost: *Brown v. Rathburn*, 10 Or. 158, cited.
3. EFFECT OF SELLING SECURITIES.—A surety is not released by the act of the creditor, pursuant to the principal debtor's direction, in selling for its market value collateral pledged by the debtor to secure the debt and applying the same as a credit, since the surety is not injured.

From Clatsop: THOS. A. McBRIDE, Judge.

Suit by O. N. Denny, as receiver of the Portland Savings Bank, against E. A. Seeley and others to foreclose a mortgage. From a decree for plaintiff, part of the defendants appeal.

AFFIRMED.

*NOTE.—See *McDougall v. Walling*, 55 Am. St. Rep. 871, for some authorities on the question of Releasing Sureties by Extending Time of Payment.

The Right of a Surety to Control the Application of Collaterals is considered in a note to *Full River National Bank v. Slade*, 12 L. R. A. 131.—REPORTER.

34	364
38	272
34	364
48	606

For appellants there was a brief over the name of *Stott, Boise & Stout*, with an oral argument by *Mr. Raleigh Stott*.

For respondent there was a brief over the name of *Nixon & Dolph*, with an oral argument by *Mr. Chester V. Dolph*.

MR. JUSTICE MOORE delivered the opinion.

This is a suit to foreclose a deed intended as an equitable mortgage. The transcript shows that E. A. Seeley, L. B. Seeley, and James Means purchased for the sum of \$26,000 a tract of land in Clatsop County, and had it conveyed to H. C. Stratton, in trust to secure the payment of a promissory note executed by E. A. and L. B. Seeley to the Portland Savings Bank for the sum of \$16,000 and interest. As additional security therefor, and in pursuance of an agreement with Means, L. B. Seeley pledged to the bank fifty shares of the capital stock of the Willamette Falls Electric Light Company, of the face value of \$5,000. Prior to the maturity of the note, the bank, at the request of L. B. Seeley, but without the consent of Means, sold the stock for \$5,000, the market value thereof, and indorsed the proceeds on said note. Stratton conveyed said tract to plaintiff, who had been appointed receiver of the bank, and, default having been made in the payment of the note, this suit was instituted, but, Means having died prior thereto, the executor of his last will and testament, his widow and heirs were made parties, who, admitting the material allegations of the complaint, aver that the sale of said stock without Means' consent discharged the lien of the mortgage upon the undivided one-third of the land, which they prayed plaintiff might be required to convey to said heirs. The court, however, denied the relief so

demand, and rendered a decree foreclosing the mortgage, whereupon the said executor, widow and heirs appeal.

It is contended by appellants' counsel that Means having paid one-third of the purchase price of the land conveyed to Stratton in trust to secure the payment of the note of E. A. and L. B. Seeley rendered his interest in the premises in the nature of a surety for their debt, and that the bank, having sold said stock without his consent, so changed the terms of the original contract as to discharge his interest in the land; and hence the court erred in not decreeing a conveyance thereof as prayed for in the answer. The appeal presents for consideration the relation which Means' interest in the real property sustained towards his co-tenants in view of the conveyance of the land to secure the payment of their debt, and the effect upon such interest of the sale, without his consent, of the stock so pledged as additional security.

1. The rule is well settled that whenever a person who is not personally responsible as a surety pledges or mortgages his property to secure the debt, or to answer for the default or miscarriage, of another, such property becomes a surety or guaranty for the principal debtor, and any act of the creditor that would discharge a personal surety will relieve the property: *Gray v. Holland*, 9 Or. 512; *Rowan v. Manufacturing Co.*, 33 Conn. 1; *Spear v. Ward*, 20 Cal. 659; *Hassey v. Wilke*, 55 Cal. 525; *Bull v. Coe*, 77 Cal. 54 (11 Am. St. Rep. 235, 18 Pac. 808); *Christner v. Brown*, 16 Iowa, 130; *Ryan v. Trustees*, 14 Ill. 20; *Wolf v. Banning*, 3 Minn. 202; *Johns v. Reardon*, 11 Md. 465; *Knight v. Whitehead*, 26 Miss. 245; *Barnes v. Mott*, 64 N.Y. 397 (21 Am. Rep. 625); *Wallace v. Hudson*, 37 Tex. 456. In *White v. Ault*, 19 Ga. 551, the facts were that Edward White being indebted on a promissory

note to Henry Ault, and Charles A. Stafford being indebted to White, Stafford, in pursuance of a mutual agreement, gave his note, secured by a mortgage of real property, to Ault, who thereupon surrendered White's note. White, to further secure the payment of Stafford's note, executed a deed to Ault, which was intended as a mortgage of certain lots. Ault, having neglected to record Stafford's mortgage, took judgment against him on his note, and, without White's consent, stipulated to stay the enforcement of the judgment for a given time, and in a suit by White to have his deed set aside it was held that by the transaction White's property became a surety only to Ault for Stafford's debt, and that the stay of execution without White's consent discharged the lien upon the lots. In the notes to the case of *Dering v. Earl of Winchelsea*, 1 White & T. Lead. Cas. Eq. 137, the editors, speaking of what acts will constitute the relation of principal and surety, say: "Every one is a surety, within these principles, who incurs a liability in person or estate at the request and for the benefit of another, without sharing in the consideration." "A surety," says Mr. Justice SWAYNE in *Magee v. Insurance Co.*, 92 U. S. 93, "is 'a favored debtor.' His rights are zealously guarded, both at law, and in equity. The slightest fraud on the part of the creditor, touching the contract, annuls it. Any alteration after it is made, though beneficial to the surety, has the same effect. His contract exactly as made is the measure of his liability; and, if the case against him be not clearly within it, he is entitled to go acquit."

2. Where, however, no new contract is entered into between the principal debtor and his creditor, but the latter, without the consent of the surety, releases some property which was intended by the debtor as security, or where by the gross carelessness of the creditor such

property is lost, the surety is released only *pro tanto*: 2 Brandt, Sur. (2 ed.), § 426; 1 Story, Eq. Jur. § 326; *Brown v. Rathburn*, 10 Or. 158; *Griffeth v. Moss*, 94 Ga. 199 (21 S. E. 463); *Kirkpatrick v. Hawk*, 80 Ill. 122; *Stewart v. Davis' Executor*, 18 Ind. 74; *Bonney v. Bonney*, 29 Iowa, 448; *Barrow v. Shields*, 13 La. Ann. 57; *Cummings v. Little*, 45 Me. 183; *Ives v. Bank*, 12 Mich. 361; *Green v. Dougherty*, 55 Mo. App. 217; *Bank v. Colcord*, 15 N. H. 119 (41 Am. Dec. 685); *Bronson v. McCormick Machine Co.*, 52 Neb. 342 (72 N. W. 312); *Everly v. Riee*, 20 Pa. St. 297; *Wharton v. Duncan*, 83 Pa. St. 40; *Baker v. Briggs*, 8 Pick. 122 (19 Am. Dec. 311); *Loop v. Summers*, 3 Rand. (Va.), 511; *Payne v. Bank*, 6 Smedes & M. 24; *Harrison Machine Works v. Templeton*, 82 Tex. 443 (18 S. W. 601); *Hurd v. Spencer*, 40 Vt. 581; *Bank v. Shields*, 55 Hun. 274 (8 N. Y. Supp. 298).

In *Bank v. Baker*, 4 Metc. (Mass.), 164, Mr. Justice WILDE, discussing this question, says: "It is a settled rule in equity that if the creditor, by a binding agreement with the principal debtor, extends the time of payment without the consent or privity of the surety, such an agreement will *ipso facto* discharge the surety, although the surety does not thereby sustain any injury, and although he may derive an actual benefit from the extension of the time of payment: Chitty, Cont. (5 Am. ed.), 529; 2 Keen, 644. This rule, however, is founded on the consideration that the extension of time is a new contract, to which the surety is not a party, and for the performance of which, therefore, he is not bound. But this reason does not apply to a case where the creditor relinquishes securities to the benefit of which the surety is entitled. In such a case, the surety is not discharged absolutely, without regard to the value of the securities. He is entitled only to be exonerated to the extent of the value of them." In *Neff's Appeal*, 9 Watts & S. 36,

SERGEANT, J., illustrating the principle here announced, says: "The ground upon which the relinquishment or negligent losing of a security taken of the principal debtor by the creditor for the whole or part only of the debt is held to be a release of the surety, either for the whole or *pro tanto*, as the case may be, is that the surety, upon payment of the debt to the creditor, is entitled to the benefit of all securities which the creditor has that he could have rendered available against the principal debtor; and if any of these securities have become lost, or have become lessened in value, in consequence of the neglect or default of the creditor, the surety's liability to the creditor will be diminished to that extent: Vide Pitm. Sur. 113, 114; 40 Law Lib. 86; Theo. Prin. & Sur. 84, 85, *et seq.*; *Com. v. Miller*, 8 Serg. & R. 452, 457, 458; 2 Swanst. 189. When the real value of the security lost by the neglect of or given up by the creditor is capable of being ascertained with certainty, and it is less than the amount of the debt, it would not only be contrary to reason to extinguish the liability of the surety entirely, as a diminution equal in extent to the value of the security given up or lost is amply sufficient to protect him from any loss that could accrue from his not obtaining such security, which is the utmost that he can with reason claim, but it would likewise be repugnant to the ground or principle upon which the surety has a right to claim a discharge from his liability as such."

3. The claim for indemnity on the part of the surety who has been compelled to pay the debt of his principal is founded upon the doctrine of natural equity which arises at the time the relation is entered into, and is consummated when the debt is paid by the surety, who is at once subrogated to all the rights and remedies of the creditor, and entitled to have all the original and

collateral securities which the creditor held against the principal debtor transferred to him: *Wayland v. Tucker*, 4 Grat. 267 (5 Am. Dec. 76); *Atwood v. Vincent*, 17 Conn. 575; *Lewis v. Palmer*, 28 N. Y. 271; *York v. Landis*, 65 N. C. 535. If Means had discharged the note for the payment of which his equitable interest in the land was hypothecated, he would have been subrogated to all the rights of the bank, and entitled to have the whole estate in the premises conveyed, and said stock transferred to him (*Keel v. Levy*, 19 Or. 450, 24 Pac. 253); in which case he would have been obliged to indorse upon the note the value of such stock. The bank sold the stock for the account of L. B. Seeley, and indorsed the value thereof upon the note without altering the terms of the original contract; and, as the value of the stock has declined since such sale was consummated, the surety sustained no injury, and hence the decree is affirmed.

AFFIRMED.

Argued 20 December, 1898; decided 30 January, 1899.

WHIPPLE v. SOUTHERN PACIFIC COMPANY.

[55 Pac. 975.]

1. RULES OF COURT—ABSTRACT OF RECORD.—An objection that appellant's abstract is not indexed as required by rule 9 of this court (24 Or. 596) comes too late after respondent has filed a brief on the merits of the case.
2. JUSTICE OF THE PEACE—DEFAULT.—The mere presence of the defendant in court by an attorney will not prevent the rendition of a judgment against him in a justice's court for want of an answer under Hill's Ann. Laws, § 530. Under the statute, Laws, 1898, p. 38, he has the choice of an oral or written answer, but some answer must be made or judgment may be entered against him.
3. IMPLIED REPEAL—APPEAL FROM DEFAULT JUDGMENT.—Laws, 1898, p. 38, § 6, authorizing the circuit court, on appeal from a justice's court, to disregard irregularities and imperfections in matters of form as to the proceedings below, does not modify Section 2117, Hill's Ann. Laws, which prohibits an appeal from a justice's judgment given for want of an answer, since, there being no answer, there is no "matter of form" to be disregarded.
4. JUSTICE OF THE PEACE—APPEAL—TORT.—To entitle a defendant who suffered a default in a justice's court in an action for tort to appeal from the assessment of damages under Hill's Ann. Laws, § 249, subd. 2, permitting the

defendant, notwithstanding his default, to offer proof on the question of damages and to appeal from the assessment thereof, he must offer proof in the justice's court.

5. JUDGMENT ON DISMISSAL OF APPEAL.—The circuit court, in dismissing an appeal from a justice's court, cannot render judgment for appellee: *State ex rel. v. McKinnon*, 8 Or. 485, and *Neppach v. Jordan*, 13 Or. 246, followed.

From Douglas: J. C. FULLERTON, Judge.

This action was commenced by William Whipple against the Southern Pacific Company in the Justice's Court of Pass Creek Precinct, Douglas County, to recover the sum of \$50, the alleged value of a cow, which was killed by being struck with a locomotive operated by defendant's servants. The transcript shows that defendant, having been served with the summons in said action, appeared by an attorney at the time and place specified in the notice, whereupon the court, at its request, postponed the trial to June 23, 1896, at the hour of 10 o'clock A. M.; that at the time so appointed the court, at defendant's request, adjourned the hearing another hour, at the expiration of which time the following entry was made in the justice's docket, to wit: "June 23. The hour of 11 o'clock having arrived, and no answer or pleading of any kind having been filed, plaintiff again demanded judgment, and it is by the court considered, ordered and adjudged that said plaintiff have of and from said defendant the sum of \$50, and his costs and disbursements at \$20.85, and hereof let execution issue." From this judgment the defendant appealed to the circuit court, and there moved for leave to file a formal answer, which, being denied, the appeal was dismissed, and judgment rendered against defendant as originally given, and for plaintiff's costs and disbursements incurred in the circuit court; and from this latter judgment defendant appeals.

REVERSED.

For appellant there was a brief over the names of *Albert H. Tanner* and *Wm. R. Willis*, with an oral argument by *Mr. Tanner*.

For respondent there was a brief over the name of *E. D. Stratford*, with an oral argument by *Mr. Andrew M. Crawford*.

MR. JUSTICE MOORE, after stating the facts, delivered the opinion of the court.

1. As a preliminary matter, plaintiff's counsel move to dismiss the appeal upon the ground that appellant's printed abstract is not indexed, and does not contain so much of the record as is necessary to a full understanding of the questions presented for decision. The respondent, availing himself of the provisions of rule five of this court, filed an additional abstract, containing such portions of the omitted record as he deemed essential to a full understanding of the questions involved in the appeal, thus correcting the record in that respect. The objection that the abstract does not contain an index comes too late after respondent has filed his brief upon the merits, and hence the motion is denied.

2. Considering the appeal as made by the record, it is contended by defendant's counsel that no formal or written answer was required in the justice's court (Laws, 1893, p. 38), and that, defendant being in court by an attorney, and ready for trial, no judgment could be rendered against it for want of an answer. A defendant appears in an action when he answers, demurs, or gives the plaintiff written notice of his appearance, and until he does so appear he shall not be heard in such action: Hill's Ann. Laws, § 530. In *McCoy v. Bell*, 1 Wash. St. 504 (20 Pac. 595), under a similar statute, it was held

that a defendant, in person or by an attorney, must give notice of his appearance, and that a mere corporal presence of the defendant or his agent at the place of trial is not sufficient, notwithstanding the Code of Washington provided that pleadings, except in certain cases, can be made orally or in writing. See, also, *Belknap v. Charlton*, 25 Or. 41 (34 Pac. 758). If the rule was as contended for, and a plaintiff could not take judgment when the defendant was present in court, what an anomalous condition would confront a plaintiff when the defendant appeared in pursuance of the service of a summons, but refused to plead. The pleadings in a justice's court may be either oral or in writing, but, when oral, the substance thereof must be entered in the justice's docket: Laws, 1893, p. 38. The transcript of such docket, however, fails to show that defendant's attorney made any oral statement to the justice which he desired should be entered in the docket as an answer to the complaint, and, as he failed to file a written answer within the time allowed by the court, the defendant was in default when the judgment was rendered.

3. It is contended that the amendment of 1893 (Laws, 1893, p. 38, § 6), which provides that "whenever an appeal shall have been taken from the judgment rendered in the justice's court, and perfected by giving service and filing the notice of appeal, and giving the undertaking, and filing the transcript as required by law, the circuit court shall proceed to hear, try, and determine the cause anew, disregarding irregularities and imperfections in matters of form which may have occurred in the proceedings in the justice's court," has repealed by implication Section 2117, Hill's Ann. Laws, which denies the right of appeal from a judgment of a justice's court given for want of an answer. The amendment relied upon was undoubtedly intended by the legislative assem-

bly to simplify proceedings in a justice's court by permitting parties litigant to make an oral statement to the justice, to be entered in his docket as a pleading, instead of filing a formal writing constituting a cause of action or defense; but there must be some pleading in that court, or there could be no "matters of form" to be disregarded. The amendment does not, in our opinion, modify section 2117 of the Code; and the judgment, having been rendered for want of an answer, was not appealable. The circuit court was, therefore, powerless to allow the defendant to file an answer by way of amendment, for, as was said by Mr. Justice BEAN in *Meyer v. Edwards*, 31 Or. 23 (48 Pac. 696), "Before there can be an amendment, there must evidently be something to amend."

4. It is insisted that, inasmuch as the action sounds in tort for damages, the appeal was well taken under Hill's Ann. Laws, § 249, Subd. 2, which provides, in substance, that in all actions of this character, if no answer be filed, the court, without the intervention of a jury, shall assess the damages to which the plaintiff is entitled; that the defendant shall not be precluded by reason of his default from offering proof of the damages, and may appeal from the assessment thereof. A default in an action sounding in damages or tort is an admission that plaintiff has a cause of action as alleged, but by reason of that statute defendant is permitted to controvert the *quantum* thereof: *Deane v. Willamette Bridge Ry. Co.*, 22 Or. 167 (15 L. R. A. 614, 29 Pac. 440). This, however, must be done in the court in which the action was brought, for, under a statute like ours, which prohibits an appeal from a judgment rendered for want of an answer, the default is tantamount to a consent on the part of the defendant that such court shall assess the damages which are sought to be recovered, and that,

unless he offers proof in mitigation thereof, the judgment in this respect shall be final. If this were not so, a defendant would not be compelled to plead to such actions or to offer any proof in a justice's court; thereby making his default serve the purpose of a plea, and his failure to offer such proof equivalent to a trial, and permitting him to appeal from the assessment of damages. Construing subd. 2 of section 249 and section 2117 of the Code *in pari materia*, we think a defendant who makes default in a justice's court in an action sounding in tort is confined, in offering proof in mitigation of damages, to the court in which the action was commenced, if he would appeal from such assessment, but, the defendant having neglected to offer such proof in this respect, the circuit court properly dismissed the appeal.

5. But, having proceeded further, and rendered judgment against defendant as in the justice's court, the circuit court was in error: *Fassman v. Baumgartner*, 3 Or. 469; *Long v. Sharp*, 5 Or. 438; *State ex rel. v. McKinnon*, 8 Or. 485; *Neppach v. Jordan*, 13 Or. 246 (10 Pac. 341). The judgment will therefore be reversed, and the cause remanded, with instructions to dismiss the appeal.

REVERSED.

Argued 16 January; decided 20 March, 1899.

KERSHAW v. LADD.

[44 L. R. A. 236; 56 Pac. 402.]

BANKS—CONSIDERATION FOR SERVICES.—An agreement by a bank to collect a check and issue a certificate of deposit for the proceeds, is based on a sufficient consideration to make it liable for negligence in attempting the collection.

NEGLIGENCE IN COLLECTION.—It is not negligence for a bank which has received for collection an ordinary unindorsed check to send it to the drawee with a request for payment, where such is the custom among banks.

BANKS—REASONABLENESS OF CUSTOM.—A custom of banks to send checks direct to the drawee banks for collection and return is not unreasonable, at least as applied to the collection of a plain undorsed check.

USAGE—PRESUMPTION—BURDEN OF PROOF.—Usages are presumed to be reasonable, and the person attacking them has the burden of showing their unreasonableness.

NEGLIGENCE IN COLLECTION.—Where a collecting bank accepted in payment of the collection a check or draft which was dishonored on presentation, it is not liable to the sender of the claim where the latter was not thereby injured.

From Multnomah: E. D. SHATTUCK, Judge.

This is an action by Andrew Kershaw to recover damages for alleged negligence on the part of Ladd & Tilton in the attempted collection of a check drawn by plaintiff in their favor upon the United States Banking Co. The defendants are bankers, located at Portland, and the United States Banking Co. at Sheridan, fifty miles distant. The plaintiff resided at Grand Ronde, some fifteen miles from Sheridan, and, on January 16, 1894, forwarded from there the check in question to the defendants at Portland, with instructions to collect, and remit a certificate of deposit for one year, bearing interest. The check was received by defendants January 18, and forwarded to the United States Banking Co. the same day for collection and return. The banking company received it the next day, and on the twenty-third drew a draft for the amount thereof upon the Merchants' National Bank, its correspondent at Portland, and on the twenty-fourth sent the same through the mail to defendants, who received it the same day, and presented it for payment, which was refused. They immediately notified plaintiff by letter at Grand Ronde, and asked for instructions. Plaintiff replied on the twenty-seventh, saying: "I am at a loss as to the best course to pursue in the matter. I understand that there has been no attachment issued on the bank at Sheridan. The prevailing opinion is that they will be able to make satisfac-

tory arrangements as soon as J. M. Baldridge, the vice president of the U. S. Banking Co., returns from the East, which will take place in a few days. However, if you think best, hold the check; if not, return to me. Any advice you can give me will be greatly appreciated." Defendants received the reply on the thirtieth, and on the thirty-first sent a letter to plaintiff, of which the following is a copy: "We have written to the Bank of Sheridan that they return the check for \$1,500 which we sent to them for collection for you, as requested. They replied to us that the sheriff was in charge at present, and they could not do it. We herewith hand you the check for \$1,500 which they remitted for your check, and we think that you had better take it, as it is the evidence of your claim against the bank, and go to Sheridan, and see what you can do in the matter of getting your money." Plaintiff had \$1,717.71 on deposit with the banking company at the date of his check. The company closed its doors January 24. It had cash on hand, January 20, \$2,726.25; January 21, \$2,891.50; January 23, \$2,973.71; January 24, \$2,265.42. On February 3 plaintiff assigned his said deposit to Paul Fundman for the purpose of collection, who thereupon sued the company, attached its property, and subsequently procured judgment; but, owing to prior attachments, the first of which was issued January 26, was unable to secure anything thereon. At the time the defendant forwarded the check to the banking company, it was in good standing, and had theretofore paid all demands promptly. The defendants had no correspondent at Sheridan, but a reliable express agency and another bank were located there, the latter of which had been doing business but a short time, and defendants did not appear to have had any knowledge of its existence. The defense is set up that the check in question was a plain,

ordinary one, without indorsements; that defendants undertook and agreed to collect the same in accordance with the custom and ordinary method by which such collections were made by banks; that there was no agreement by which they were to receive compensation for their services; that, in attempting to collect said check, they pursued the general and universal custom obtaining among banks in Portland and elsewhere, and that by reason thereof they were not chargeable with negligence. As a second defense, it is alleged that plaintiff ratified defendants' said acts by accepting the draft remitted to them by the banking company, and retaining the same for more than a year without making any claim for negligence against the defendants. Trial was had before the court, and, judgment being for defendants, plaintiff appeals.

AFFIRMED.

For appellant there was a brief and an oral argument by *Messrs. O. H. Irvine and O. P. Coshov*.

For respondent there was a brief over the name of *Williams, Wood & Linthicum*, with an oral argument by *Mr. Stewart Brian Linthicum*.

MR. CHIEF JUSTICE WOLVERTON, after stating the facts, delivered the opinion of the court.

The question presented is whether the defendants were guilty of negligence in forwarding plaintiff's check direct to the bank upon which it was drawn, and in retaining the evidence of indebtedness until it had closed its doors, and its property had been seized on attachment. The instrument was a plain, ordinary check, unindorsed, save as it may have been indorsed by the defendants prior to forwarding the same for collection and return.

The engagement of the defendants was to collect and issue a certificate of deposit for the proceeds, drawing interest. There is some controversy as to whether the defendants were to receive any compensation for their services; but the very terms in pursuance of which they undertook the collection would indicate that they were to receive a sufficient consideration to make them liable for neglect of the duty enjoined upon them. They were to have the use of the money when collected, upon which they intended to pay the plaintiff interest; and this, we are impelled to believe, would be sufficient within itself. Generally speaking, it can make no difference that a bank makes no direct charge for its services in collecting, for the benefits which it ordinarily and usually derives from the use of the funds while in its custody, and the advantages which may arise from business associations, are held and deemed to be adequate consideration for the undertaking, and quite sufficient upon which to predicate the liability incident thereto: *Merchants' National Bank v. Goodman*, 109 Pa. St. 422 (58 Am. Rep. 728, 2 Atl. 687); *Bailie v. Augusta Savings Bank*, 95 Ga. 277 (51 Am. St. Rep. 74, 21 S. E. 177); *Titus v. Merchants' National Bank*, 35 N. J. Law, 588. In the ordinary transaction, where a check is given and received in payment of a demand, the discharge of the demand is conditional upon the honor and payment of the check when presented in due course of established business usages, sanctioned by law; but failure to present it to the drawee for payment within the proper time, depending upon the proximity of the payee and the drawee to each other, and to notify the drawer of nonpayment, will discharge the drawer's obligation to the extent of his loss by reason of such failure of demand and notice: *Gregg v. George*, 16 Kan. 546. It is said: "A check differs from a bill of exchange in several particulars. It has no days of grace, and re-

quires no acceptance distinct from prompt payment. The drawer of the check is not a surety, but the principal debtor as much as the maker of a promissory note. It is an absolute appropriation of so much money in the hands of the banker to the holder of the check, and there it ought to remain until called for, and the drawer has no reason to complain of delay, unless upon the intermediate failure of his banker. By unreasonable delay in such a case the holder takes the risk of the failure of the person or bank on which the check is drawn:” 3 Kent, Comm. *104, note 2.

The rule governing the time in which the holder is required to present a check in order to relieve himself from the risk of loss by failure of the drawee may be stated as follows: If the payee receives the check in the same place where the bank upon which it is drawn is located, he may present it for payment at any time before the close of banking hours of the next secular day, and thereby maintain recourse against the drawer. If, in the meantime, the bank fails, the loss will be the drawer's. The term “secular day” is used to exclude Sunday, so that, if the check be received on Saturday, the payee would have all day on the Monday following in which to make the presentment. But, if the payee receives the check in a place distant from where the drawee bank is situated, it will be sufficient for him to forward it by post, on the next secular day after it is received, to some person at the latter place, who is required to present it for payment on or before the next day after it reaches him in due course of mail. These periods, depending upon the location of the respective participants, which are declared requisite for the convenient presentment of a check, are deemed to have been contemplated by the drawer, and he remains absolutely liable, although the bank might fail pending their

duration: 2 Daniel, Neg. Inst. §§ 1590, 1592; *Farwell v. Curtis*, 7 Biss. 160 (Fed. Cas. No. 4,690). The allowance of a day, however, in which to present the check does not extend to an agent who receives one for the debt of his principal. Such a check must be presented with due and proper diligence; otherwise, it is at the peril of the party retaining it and postponing presentment, as between him and the person in whose interest he is acting: *Smith v. Miller*, 43 N. Y. 171 (3 Am. Rep. 690); *Anderson v. Gill*, 79 Md. 312 (25 L. R. A. 200, 47 Am. St. Rep. 402, 29 Atl. 527). The rules in respect to giving notice of the dishonor of a check are the same as where a bill of exchange or promissory note is involved. If anything, however, by reason of the intention of the parties to the instrument that the payment should be immediate, and of the fact that it is drawn against a deposit, they are to be more strictly construed and enforced in the case of a check than of other commercial paper: Tiedeman, Com. Paper, § 442.

The parties agree that at the time the transactions which form the basis of the present controversy took place there existed, and still exists, among the banks in Portland and elsewhere a general and well established custom to the effect that when a bank or banker receives for collection an ordinary check against an account with a bank or banker, situated and doing business at a place distant from where the collecting bank is located, and such collecting bank has no agent or correspondent at the place of the drawee bank, for the collecting bank to forward the check by mail directly to the drawee bank for collection and returns; and that it is also a general and well established custom among such banks that when a bank or banker receives from a bank or person at a distance, for collection and return, an ordinary check, drawn upon a bank situated at the same place as the re-

ceiving bank, for the receiving bank not to remit cash to the bank or person from whom such check was received, but to remit the check or draft either of the receiving or drawee bank, drawn upon the correspondent of such receiving or drawee bank at the place from which the original check was forwarded, payable to the order of the bank or person from whom the check was received. It is contended by the respondents that these customs are to be considered the law of the case, and are controlling for the government of the parties; and that, measured thereby, the defendants are not chargeable with negligence for pursuing the course adopted in endeavoring to make the collection. Upon the other hand, it is maintained that the custom of sending the check direct to the drawee bank for collection and return is unreasonable, and, therefore, that it does not and cannot obtain the sanction of law, and that such an act is negligence *per se*, which will, in case loss should occur by reason thereof, render the collecting bank liable therefor. The reason assigned is that the collecting bank thereby makes the drawee bank its agent for presentment, demand, protest, and giving notice of nonpayment to the indorsers, if any, and the drawer; and that the duties thus devolving upon such an agent are inconsistent, and incapable of being performed by the drawee of the check, as it is said he cannot present a demand to himself, or demand payment of himself, much less protest his own paper, and give notice to the proper parties that he has refused payment. There exist two different theories among the courts of this country touching the responsibility of banks undertaking collections of commercial paper at a distance. One line of authorities holds to the rule that the forwarding bank is liable only for the selection of a suitable local agent with whom to intrust the collection, and that the agent so selected becomes the agent of the owner of the

paper; while, on the other hand, it is held that the forwarding bank makes the local agent its own subagent, and is liable for any neglect on the part of such subagent. But it is argued that in either event the defendants are liable, as, under the latter rule, they became absolutely responsible for the conduct of the Sheridan Bank, while, under the former, it was negligence *per se* to have selected the Sheridan Bank as agent for the purpose of consummating the collection. It does not appear to us, however, to be necessary to the determination of the present controversy that either rule should be adopted or applied. The check in question was drawn payable to the defendants, and was unindorsed by any one, so that there were no indorsers or third parties in the transaction to be subserved, and protest and notice thereof were unnecessary and not required. The defendants, therefore, assumed the simple duty of presenting the check for payment, under the rules of law obtaining, and, if not paid, or payment was refused, of notifying the drawer, so that he might not suffer loss by reason of the failure of the drawee bank.

In *Prideaux v. Criddle*, L. R. 4 Q. B. 455, it is said: "A presentment through the postoffice is a reasonable mode of presentment; it is a very common mode, and having regard to the commercial business of this country, it may be said to be a proper mode of presentment. If the drawee dishonors the check, and the holder sends a notice of dishonor to the person from whom he received the check on the day following that on which the check was dishonored, each previous transferrer has one day in which to give notice of dishonor." In *Bailey v. Bodenhams*, 16 C. B. N. S. 288, ERLE, C. J., was inclined to think that a check sent through the post to the drawee was a good presentment, and he says: "But, unless the money was remitted by return of post, the absence of

an answer should have been considered as a dishonor, and notice of such dishonor should have been given promptly." In *Heywood v. Pickering*, L. R. 9 Q. B. 428, where the check was sent to the drawees direct, with demand for payment, BLACKBURN, J., thought it to be a good presentment for payment, and that the refusal to remit constituted an actual dishonor of the check. QUAIN, J., in the same case, says: "There is ample evidence that, according to the custom of bankers, when a foreign check is paid to a banker by a customer, that is the usual mode of transmitting checks. Is that a good presentment? In *Bailey v. Bodenham*, ERLE, C. J., and BYLES, J., thought that sending a check by post to a banker might be a good presentment of a check; and in *Prideaux v. Criddle*, LUSH, J., was of opinion that a presentment through the postoffice was a reasonable mode of presentment. Therefore, we have it that, in the present case, there was a due presentment of the check according to these authorities." As supporting this position, see, also, 2 Daniels, Neg. Inst. § 1559.

These are English cases, it is true, but a like manner of presentment seems to have received recognition in this country. In the case of *Indig v. National City Bank*, 80 N. Y. 100, a note, unindorsed, payable at the Bank of Lowville, was placed in the hands of defendant for collection, who, instead of sending it to an agent or correspondent at Lowville for presentment, sent it by mail directly to the Lowville Bank. It was remarked that such a method appeared to be the ordinary one for the transaction of such business, and the defendant was bound only to adopt the ordinary mode, and that the practice was sanctioned by the English cases. It was there contended that by sending the note direct to the Lowville Bank the collecting bank thereby constituted the Lowville Bank its agent; but it was held that, in

so far as it related to the presentment of the note at the bank, and the duties of the bank in respect to it, it was equivalent to a check drawn by the maker upon the bank where the note was payable. As the case bears some analogy to the one at bar, we may be pardoned if we quote somewhat at length from the opinion of RAPALLO, J. He says: "The bank owed a duty to its customer to pay it on presentation, if in funds. The defendant used the United States mail to make the presentment, and by this means caused it to be presented to the bank for payment on the day when due. It did not deposit it there for collection. If there had been indorsers, it might be argued that the defendant constituted the Bank of Lowville its agent to notify the indorsers of nonpayment; but even this is very questionable, for it was held in a similar case that, if the proceeds were not remitted, the paper should be deemed dishonored, and notice of nonpayment should be given by the bank which had sent it: *Bailey v. Bodenham*, 16 C. B. N. S. 288. No such question arises, however, in the present case, for there were no indorsers. The defendant, by sending the note to the Bank of Lowville, requested it to pay it, not to receive the proceeds. The object of sending was to extract money from the bank, as agent of the maker of the note, not to put money in the bank as agent of the defendant, or to the credit of the defendant. There is nothing in the nature of the transaction which should render the defendant guarantor of the solvency of the Bank of Lowville. * * *

The bank on which the note is drawn has nothing to do but to pay the note if in funds, and, if not, to refuse to pay. If it pays, it does so on behalf of the maker, and no relation is created between it and one who presents it by mail different from that which would exist if presented through any other agency, unless accompanied

by a request to do some further act in behalf of the sender beyond complying with its duty to its own customer."

And in *Briggs v. Central Nat. Bank*, 89 N. Y. 182 (42 Am. Rep. 283), the same learned judge, in explanation of the opinion rendered in the Indig Case, says: "The point of the decision is that the mere act of presenting the paper for payment by mail, instead of employing a messenger to present it, does not constitute the drawee agent of the sender to receive or hold the proceeds." To the same effect, see also *People v. Merchants' Bank*, 78 N. Y. 269 (34 Am. Rep. 532). It will be noted that the presentment in the case of *Heywood v. Pickering* was in accordance with the custom then prevailing, and the one in the Indig Case was in pursuance of the ordinary method; and the custom in the one case and the method in the other were very similar to the one which it is agreed by the parties exists among the banks of Portland and elsewhere, and they seem to have been considered as controlling, and as legalizing the presentment in the respective manners there adopted. Mr. Tiedeman, in his work on Commercial Paper (§ 444), says: "A custom has grown up of late to send the check direct to the bank on which it is drawn; in other words, to make presentment by mail. The sufficiency of this method of presentment has been doubted, but it seems that this method is more or less commonly adopted, and the weight of authority is in favor of its sufficiency." In the light of these authorities, we are constrained to hold that the transmission of the check in question by the defendants direct to the Sheridan Bank, through the post, for collection and return, operated as a good presentment for payment. A custom which obtains so generally and universally among men of the highest order of business sagacity appeals strongly to the understand-

ing for recognition, and, unless demonstrated to be clearly and palpably unreasonable and unjust, it ought to be adopted as the law of the case. It is true, the admittedly prevailing custom or usage exists and applies as well to certified checks, certificates of deposit, and notes payable at the banks; but we are here dealing with a simple, unindorsed check, and are only called upon at this time to sanction the custom or usage in so far as it may be potent as affecting the present exigencies. However, there is authority for the sanction of it to the full extent prevailing, as denoted by the agreement of the parties here: *Farmers' Bank & T. Co. v. Newland*, 97 Ky. 464 (31 S. W. 38); *Jefferson County Sav. Bank v. Commercial Nat. Bank*, 98 Tenn. 337 (39 S. W. 338).

Usages are presumed to be reasonable, and in considering them the courts do not so much determine whether they are supported by satisfactory grounds as whether they are necessarily unreasonable. The party attacking the usage or custom has, therefore, the burden of the controversy, as the question to be decided in a particular case is not whether the usage is reasonable, but whether it is unreasonable: 27 Am. & Eng. Enc. Law (1 ed.), 766.

Cases are cited and relied upon by the the appellant, wherein it is held to constitute an act of negligence, and even negligence *per se*, for the collecting bank to send paper direct to the drawee bank, located at a distant place, for collection and return. The most conspicuous of these are: *Merchants' National Bank v. Goodman*, 109 Pa. St. 422 (58 Am. Rep. 728, 2 Atl. 687); *German National Bank v. Burns*, 12 Colo. 539 (13 Am. St. Rep. 247, 21 Pac. 714); *Anderson v. Rodgers*, 53 Kan. 542 (27 L. R. A. 248, 36 Pac. 1067); *Drovers' National Bank v. Anglo-American Provision Co.*, 117 Ill. 100 (57 Am. Rep. 855, 7 N. E. 601); *Farwell v. Curtis*, 7 Biss. 160 (Fed. Case

No. 4,690); *Whitney v. Esson*, 99 Mass. 308 (96 Am. Dec. 762); *First National Bank v. City National Bank*, 14 Tex. Civ. App. 318 (34 S. W. 458); *First National Bank v. Fourth National Bank*, 6 C. C. A. 183 (56 Fed. 967, 16 U. S. App. 1); *Bailie v. Augusta Savings Bank*, 95 Ga. 277 (51 Am. St. Rep. 74, 21 S. E. 717). But in no one of these cases was there a general and universal custom relied upon to support the act of the collecting bank, as there is here. The case of *Whitney v. Esson*, *supra*, comes the nearest. The paper involved was a draft, and it is there said: "It is not a reasonable usage that one who collects a draft for an absent party should be allowed to give it up to the drawee, and sacrifice the claim which the owner may have on prior parties, upon the mere receipt of a check, which may turn out to be worthless." But this must be read in connection with the agreement of the parties in that case, which was that it was a common practice for holders of drafts or checks to accept the check of the drawee in exchange for the draft, but it was not claimed to be a generally established usage. In *Farwell v. Curtis*, *supra*, it was said the practice of sending checks by mail to the drawee was not usual, thereby indicating that no such custom or usage was there established or relied upon. In *Drovers' National Bank v. Anglo-American Provision Co.*, 117 Ill. 100 (57 Am. Rep. 855, 7 N. E. 601), a custom was sought to be established, but it was not broad enough, as remarked by the court, to include the certified check which formed the basis of the action. And in *First National Bank v. City National Bank*, 12 Tex. Civ. App. 319 (34 S. W. 458), the statement of the case shows it did not appear that the owners of the paper, by consent or usage, authorized the forwarding of their draft direct to the drawee. These cases involve, indiscriminately, ordinary checks, certificates of deposit, certified checks, and drafts. Upon principle it would

seem that the usage is not an unreasonable one, in so far, at least, as it may apply to the collection of a plain unindorsed check. If payment of such check is refused, the payee may sue the drawer for breach of contract; but the drawer only can sue the drawee, and this upon the implied contract to pay upon demand. The bank of deposit has but a simple duty to perform when the paper is presented for payment only, and that is to honor it by compliance with the demand; so that the manner of presentment and demand for payment, whether over the counter or through the post, cannot affect the discharge of such duty. In no sense can it become the agent of the party presenting it, or of the drawer, by acting in the discharge of its duty in honoring it, and making payment. Where a party employs a bank to make a collection at a place distant from where the bank is located, and nothing is said touching the specific manner of making the same, it must be presumed it was intended by the customer of the bank that the collection would be made in the usual and ordinary manner, and in accordance with the general usage and custom prevailing among banks. If the collection is made in accordance therewith, the bank has performed its undertaking: *Farmer's Trust Co. v. Newland*, 97 Ky. 464 (31 S. W. 38); *Jefferson County Savings Bank v. Commercial National Bank*, 98 Tenn. 337 (39 S. W. 338).

Now, to recur to the facts: The plaintiff had on deposit with the Sheridan Bank \$1,717.71. Of this fund he proposed sending \$1,500 to the defendants, in Portland, for the purpose of making a time deposit with them, drawing interest. He informed the Sheridan Bank of his intention to draw upon it for that amount, and, as a means of having the money transmitted to Portland, he drew his check in favor of the defendants. They, in pursuance of the custom, sent it by mail to the

Sheridan Bank for collection and return. This must be considered a demand upon that bank for payment, and it had but a simple duty to perform, which was to pay; and this it should have done, not as the act of either the defendants or the plaintiff, but for itself; and therefore it could not have been the agent of either in the performance of such duty. The failure to pay upon presentment and demand was a refusal to pay, and a dishonor of the check, and the defendants, not having received payment thereof by return mail (having regard for the business hours of the banking company and the arrival and departure of the mails), should have so treated it, and notified the plaintiff thereof by the following mail, or, at least, by the mail of the following day. It was the duty of the defendants, they not being in a condition to sue the drawee, to notify the plaintiff at once of the dishonor of his paper, so that he could have brought an action against it, if he so desired, for the recovery of his deposit. But the case was not presented upon the theory that the loss to plaintiff was caused by the negligence of defendants in failing to notify him of the dishonor of his paper. By this, however, we do not intimate that the facts as disclosed by the record would support such theory.

The specific charges of negligence are that defendants sent the check direct to the drawee bank for collection, and retained the evidence of indebtedness until after the bank had closed. Upon the first ground we have seen that the act of sending the check direct to the drawee for collection was not negligence, under the usage and custom prevailing, and in the light of defendants' undertaking; and, upon the second ground, it is plain that plaintiff could not have been injured by the retention of the check, as he was enabled to and did sue without it. In this view, the question of ratification becomes unim-

portant. The findings of fact are full upon all the issues made, and amply support the conclusions of law. The judgment will therefore be affirmed.

AFFIRMED.

Decided 13 January, 1896; rehearing denied 10 April, 1899.

WALKER v. BLOOMINGCAMP.

[48 Pac. 175.]

34	391
35	186
34	391
45	106

1. TRESPASS—ANIMALS RUNNING AT LARGE—FENCES.—Where the fence law is applicable the common law liability for injury by domestic stock to uninclosed land is abrogated; unimproved and uninclosed lands are common pasturage:* *Campbell v. Bridwell*, 5 Or. 812, cited and approved.
2. TRESPASS ON UNINCLOSED LANDS BY STOCK.—In permitting stock to graze over uninclosed land the owner is not guilty of any actionable injury, and the fact that there is a herder to protect the animals does not change the rule.

From Klamath: W. C. HALE, Judge.

This is an action brought by W. Albert Walker against Henry Bloomingcamp and others to recover for the alleged trespass of defendants' sheep upon the uninclosed lands of the plaintiff. The complaint, after alleging plaintiff's ownership of the land, avers: "That on divers days and times, between April 13, 1894, and April 21, 1894, the defendants unlawfully and willfully herded; and permitted to be herded, their bands of sheep upon the above lands, of which plaintiff was, by reason thereof, disturbed in his possession, and plaintiff's grass on said land was trodden down, eaten up, injured, and destroyed, to the plaintiff's damage in the sum of \$245. The de-

*NOTE.—This subject has been considered in the following cases: *Campbell v. Bridwell*, 5 Or. 812; *French v. Crenwell*, 13 Or. 418; *Bileu v. Paisley*, 18 Or. 47 (4 L. R. A. 840), *Moses v. Southern Pac. Co.*, 18 Or. 385; *Strickland v. Geide*, 31 Or. 373.

The liability of the owner of animals for damages done by their trespassing is extensively reviewed under appropriate subdivisions in a note to *Bulpit v. Matthews*, 22 L. R. A. 55.—REPORTER.

defendants demurred to the complaint upon the ground that it did not state facts sufficient to constitute a cause of action, and the demurrer being overruled judgment was rendered in favor of plaintiff, from which defendants appeal.

REVERSED.

For appellants there was a brief and an oral argument by *Messrs. Henry L. Benson* and *Wm. R. Willis*.

For respondent there was a brief and an oral argument by *Mr. Lionel R. Webster*.

MR. CHIEF JUSTICE BEAN delivered the opinion.

1. The common-law rule, by which the owner of domestic stock was made liable for the injury done by them to the uninclosed lands of another, is not in force in the portions of this state to which the fence law is applicable: *Campbell v. Bridwell*, 5 Or. 311. Here the rule prevails that uninclosed and unimproved lands are regarded as common of pasturage, and the owner of stock may suffer them to go at large and depasture such lands without being liable in trespass therefor. If the owner of the land would protect himself from such damage he must inclose it, or keep the stock off in some other way.

2. But the contention for the plaintiff is that this rule applies only to animals running at large, and not to the willful trespass of an owner who knowingly and intentionally drives and confines his stock upon the land of another without his consent or against his will, for the purpose of eating or destroying the grass and herbage growing thereon, and the authorities seem to be to that effect: 7 Am. & Eng. Enc. Law (1 ed.), 892; *Lazarus v. Phelps*, 152 U. S. 81 (14 Sup. Ct. 477); *Harri-*

son v. Adamson, 76 Iowa, 337 (41 N. W. 34); *Delaney v. Errickson*, 11 Neb. 533 (10 N. W. 451); *Powers v. Kindt*, 13 Kan. 74. But, in our opinion, the doctrine established by these cases cannot be made to apply to this record. The complaint does not aver that the sheep were actually and purposely driven upon the land of plaintiff by defendants, or driven there at all, or kept there, without plaintiff's consent, or even that defendants or their herders knew that the lands belonged to the plaintiff; nor does it state any facts showing a willful or intentional trespass by the owner of the sheep. It is true the complaint alleges that the sheep were unlawfully and willfully herded and permitted to be herded upon the land, but this amounts to nothing more in effect than an averment that the defendants suffered their sheep in charge of a herder to graze and pasture upon the uninclosed lands of the plaintiff. It is well known that the flock masters of the section of the state where this controversy arose are required by the necessities of the case to keep their sheep in charge of a herder, in order to protect them from loss or destruction while ranging and feeding upon the common uninclosed lands. The sheep, however, are generally permitted to roam substantially at will over the range, under the care and supervision of the herder, and if, in doing so, they go upon the uninclosed land of another for the purpose of pasturage, the owner of the land, in our opinion, has no cause of action for the trespass: *Fant v. Lyman*, 9 Mont. 61 (22 Pac. 121). It follows that when one permits his stock to run at large or graze upon uninclosed land, he is guilty of no actionable injury, and the fact that the character of the stock requires that he should have them in charge of some person to protect them from loss or destruction, does not, in our opinion, change the rule. By so doing he does nothing more than has

been by common consent done by the owners of such stock since the earliest settlement of the state, and if the practice is now to be changed it should be done by legislative enactment. The judgment is reversed, and the cause remanded with directions to sustain the demurrer to the complaint.

REVERSED.

Decided 10 April, 1899.

ON REHEARING.

[56 Pac. 809.]

PER CURIAM. After a careful review and re-examination of the whole cause, as presented at the argument and upon briefs of counsel, we have reached the same conclusion as on the former hearing. The opinion heretofore rendered will, therefore, be adhered to, with the same result as it respects the judgment of the court below.

REVERSED.

Decided 13 March; rehearing denied 24 April, 1899.

BLAGEN v. SMITH.

[44 L. R. A. 522, 56 Pac. 292.]

1. APPEAL—CONSIDERATION OF IMMATERIAL TESTIMONY.—Testimony introduced on an immaterial matter not in issue cannot be considered on appeal in an equity case tried *de novo*, although no exception was taken to its admission.
2. NUISANCE—JURISDICTION OF EQUITY.—Equity has jurisdiction to restrain existing or threatened public nuisances by injunction, at the suit of a private person who suffers therefrom a special and peculiar injury distinct from that suffered by him in common with the public at large. Hill's Ann. Laws, § 833, providing a remedy at law for a private nuisance by an action for damages and an order to abate the nuisance, is not exclusive, where immediate relief is demanded: *Fleischner v. Citizens' Investment Co.*, 25 Or. 119, cited.
3. INJUNCTION—BAWDY HOUSE.—A house of ill fame is a public nuisance, wherever it may be situated, and its continuance may be enjoined by any one who can show a special injury.*

4. *IDEM*.—Equity will enjoin the leasing of houses for brothels when they are so situated with reference to complainant's business property that the occupants of the latter are subjected to disgraceful sights and sounds, for the owner in such a case suffers a special injury in the enjoyment of his property.*

From Multnomah: LOYAL B. STEARNS, Judge.

This is a suit by private parties to enjoin the continuance of a public nuisance. The transcript shows that the plaintiff, N. J. Blagen, is the owner of two lots at the southeast corner of Couch and First Streets, in the City of Portland, upon which he erected a large four-story brick building in 1890, expending in the purchase of the land, and the improvement thereof, about \$80,000; that upon the completion of this building it was leased to the plaintiff, The W. C. Noon Bag Company, a corporation, which is engaged in the manufacture of bags, tents, awnings, and sails, employing from forty to sixty men and women; that the other plaintiffs own or are in possession of certain real property having stores, warehouses, or factories erected thereon, and all situated in the immediate vicinity of Blagen's said building; that defendant, R. C. Smith, having leased two lots diagonally across Couch Street from Blagen's building, and two lots at the southwest and two at the southeast corners of the intersection of Davis and First Streets, changed thereon various small wooden buildings into what are known as "cribs," for the purpose of renting them to dissolute women, to be used as bawdy houses. The plaintiffs substantially allege that if defendant leases these cribs, to be used for the purpose for which they were designed, it will depreciate the value of their property, render it less desirable for rent, and result in a private, special, and

*NOTE—For a case somewhat similar to this see *Naef v. Palmer*, 41 L. R. A. 219.

The case of *Haggart v. Stehlin*, 22 L. R. A. 577, is an interesting discussion of the right to enjoin the maintenance of a saloon in a residence district.

direct injury to them. The plaintiff, The W. C. Noon Bag Company, avers that from the windows in the Blagen building said cribs are in plain view; that its employees, in coming to and returning from their labor, must necessarily pass by or between these buildings, which, if they are permitted to be used for immoral purposes, will bring to the vicinity in which they are situated drunken, disorderly, and disreputable persons and criminals, the effect of which will be to endanger the lives and morals of its employees, and interfere with, disturb, and injure its business, resulting in a private, direct, and special damage to it. Whereupon plaintiffs prayed that a temporary injunction might be issued, restraining the defendant from proceeding further in the construction or repair of any building upon the said premises for the purposes of prostitution, from renting any of said cribs, or allowing any persons to occupy the same, for that purpose, and from transferring or selling said buildings to any person to be used for immoral purposes, and that upon the final hearing said injunction be made perpetual.

The defendant, after denying the material averments of the complaint, alleges, in substance, that he had expended in repairing said buildings the sum of \$5,000, and that the only manner in which he could be reimbursed for the outlay, and for the rent which he had agreed to pay for the use of the premises, was by subletting these houses, not for immoral purposes, but to any person who might wish to rent them; that they are cheap, and desirable only to a class of people who would be liable to want to live in that part of the city, which, by reason of its contiguity to the wharves on the Willamette River, and the liability of that stream to overflow its banks, would never be occupied as residence property, except by the poorest class of people, who are compelled by necessity

to seek cheap rents; that in June, 1894, the backwater from said river stood six feet deep over all said property, since which time none of it had been desirable for any purpose; that said section of the city is remote from public travel, without retail stores, and that ladies have no occasion to visit it, and never have gone into that neighborhood. The reply put in issue the allegations of new matter contained in the answer.

A trial was had, and from the evidence taken thereat the court found the facts, in substance, as above given, and also that five or six Japanese prostitutes had moved into some of these buildings since this suit was commenced, notwithstanding a temporary injunction restraining defendant from leasing them to such persons had been issued and served, and that the proximity of these cribs to the property of said Blagen may somewhat depreciate its value; that the alterations made by defendant upon said buildings have not in any manner injured plaintiff's property, or been any damage to their business; and that, if these houses be rented and used for immoral purposes, neither of the plaintiffs will suffer any special or peculiar injury therefrom, different from that sustained by the community at large. The court also made the following findings: "Tenth. That long prior to January 1, 1897, there was situated directly across the street from said property of N. J. Blagen a house of prostitution kept by one 'Liverpool Liz,' and on the corner of First and C Streets, diagonally across the street, there was what was known as the 'Bella Union Theater,' a mixed saloon, where women resorted and sold liquors; that next to the building occupied by 'Liverpool Liz' there stood a sailor boarding house, kept by Jim Turk; that this part of town is known as part of Whitechapel District. Eleventh. That at the time of bringing this suit there were, and still are, situated

within two blocks of said property of N. J. Blagen fifteen saloons, and over twenty-eight houses of prostitution, called 'cribs,' and that said cribs or houses of prostitution and saloons have been standing on said property for several years prior to January 1, 1897." The court thereupon dissolved the temporary injunction and dismissed the suit, from which plaintiffs appeal.

REVERSED.

For appellants there was an oral argument by *Mr. George Henry Williams*, with a brief over the name of *Williams, Wood & Linthicum*.

For respondent there was an oral argument by *Mr. John M. Gearin*, with a brief over the names of *Hume & Hall* and *Gearin, Silvestone & Brodie*, to this effect :

This is simply a suit brought by a party considering himself aggrieved, and alleging that his property will be damaged by certain acts threatened to be done by the defendant, and asking for a restraining order.

The fact of a nuisance or no nuisance should be decided by a jury first: *Roseburg v. Abraham*, 8 Or. 509.

In order to obtain an injunction it must be shown that the injury complained of as present or impending, is such as, by reason of its gravity, or its permanent character, or both, cannot be adequately compensated in damages: 16 Am. & Eng. Enc. Law (1 ed.), p. 959; *Wood, Nuisances*, § 646; *Duncan v. Hayes*, 22 N. J. Eq. 27; *Fogg v. Nevada-California Oregon R. R. Co.*, 20 Nev. 429.

Injunctions against threatened nuisances will seldom be granted, except in extreme cases where the threatened use of property is clearly shown to be such as leaves no doubt of its injurious results. The bill must set forth such a state of facts as leaves no room for doubt upon

the question of nuisance, for if there is any doubt upon that point the benefit of it will be given to defendant: Wood, Nuisances, § 797; High, Inj. 495, 496; *Shaubut v. St. Paul & S. C. R. R. Co.*, 21 Minn. 502; *Barnum v. Minnesota Transfer R. R. Co.*, 33 Minn. 365; *Cleveland v. Citizens' Gaslight Co.*, 20 N. J. Eq. 206; *Waupun Trustees v. Moore*, 34 Wis. 450 (17 Am. Rep. 446); *Zabriskie v. Jersey City & B. R. R. Co.*, 13 N. J. Eq. 314; *Wolcott v. Melick*, 11 N. J. Eq. 204 (66 Am. Dec. 790); *San Jose Ranch Co. v. Brooks*, 74 Cal. 465; *McCowan v. Whitesides*, 31 Ind. 237; *Hartshorn v. South Reading*, 3 Allen, 504; *Clark v. Chicago & N. W. R. R. Co.*, 70 Wis. 597; *Wesson v. Washburn Iron Co.*, 13 Allen, 101 (90 Am. Dec. 181); *Proprietors of Quincy Canal v. Newcomb*, 7 Met. 283 (39 Am. Dec. 778); *Brainard v. Connecticut River R. R. Co.*, 7 Cush. 510; *Stetson v. Faxon*, 19 Pick. 160 (31 Am. Dec. 123); *Houck v. Wachter*, 34 Md. 272 (6 Am. Rep. 332); *Marini v. Graham*, 67 Cal. 132.

MR. JUSTICE MOORE, after making the foregoing statement of facts, delivered the opinion of the court.

1. It is contended by plaintiffs' counsel that the court erred in permitting defendant, over their objection, to introduce testimony outside the issues, and in making the findings thereon numbered respectively 10 and 11. Section 397, Hill's Ann. Laws, as amended by the act of the legislative assembly, approved February 20, 1893 (Laws, 1893, p. 26), in prescribing the manner in which findings shall be prepared in suits, reads as follows: "The court in rendering its decision shall set out in writing its findings of fact upon all the material issues of fact presented by the pleadings, together with its conclusions of law thereon, but such findings of fact and

conclusions of law shall be separate from the decree, and shall be filed with the clerk and incorporated in and constitute a part of the judgment roll of said cause; and such findings of fact shall have the same force and effect and be equally conclusive as the verdict of a jury in an action at law, except on appeal to the supreme court the cause shall be tried anew without reference to such findings." The transcript shows that counsel for defendant, on his cross-examination of W. C. Noon, referring to a period of two or three years prior to the commencement of the suit, propounded to him the following question: "Do you know, during that time, of such a place as the Bella Union Theater?" Whereupon the court, upon objection being made, said: "As to the injury of the property there, I think perhaps that would be admissible." The witness answered: "I think I have seen that on the door; yes." No exception to the ruling of the court upon the admission of this testimony was saved, nor can we find, from an inspection of the transcript, that any other objection was made or exception saved to the introduction of any of the testimony tending to support the findings complained of. This being so, and the cause coming before us for trial *de novo*, the question is presented whether, in the absence of any exception to the action of the court admitting testimony tending to show that houses of ill repute and other disreputable places of resort existed in the immediate vicinity of plaintiffs' property long before defendant constructed the cribs mentioned in the complaint, such testimony shall be considered on appeal, in view of the issues of fact to be tried. In *Newby v. Myers*, 44 Kan. 477 (24 Pac. 971), it is held that the findings of fact of a trial court must be based upon the issues made by the pleadings, and any finding outside such issues is a nullity. In *Marks v. Sayward*, 50 Cal. 57, it is held

that findings of fact must be within the issues; otherwise, they will not be regarded. In *Reinhart v. Lugo*, 75 Cal. 639 (18 Pac. 112), it is held that the finding in an action of partition contrary to an admission made by the pleadings as to the plaintiff's interest in the lands in question is outside the issue and erroneous, and a judgment based thereon should be reversed. In *Hall v. Arnott*, 80 Cal. 348 (22 Pac. 200), it is held that findings upon issues not properly presented by the pleadings must be disregarded. There is no issue in the pleadings upon which findings numbered 10 and 11 can be predicated, nor was any motion made to amend the answer in this respect; and, this being so, the testimony introduced upon that subject was immaterial, and cannot be considered on appeal.

It is admitted by plaintiff's counsel that the cribs constructed by defendant and leased for immoral purposes constitute a public nuisance, notwithstanding which they contend that their clients suffered a special injury therefrom, distinct and different in kind from that sustained by the general public, and that the court therefore erred in not making the injunction perpetual; while defendant's counsel maintain that plaintiffs had a complete, speedy and adequate remedy at law for the recovery of damages and the abatement of the nuisance, and hence a court of equity has no jurisdiction to grant the relief demanded, and that, such being the case, the decree should be affirmed.

2. The statute referred to as affording a legal remedy for the suppression of a nuisance substantially provides that any person whose property is affected by a private nuisance may maintain an action at law for damages therefor, and, if judgment be given for the plaintiff in such action, he may, in addition to the execution to en-

force the same, on motion, have an order allowing a warrant to issue to the sheriff to abate such nuisance; and, if it appear on the hearing that such remedy is inadequate, the plaintiff may proceed in equity to have the defendant enjoined: Hill's Ann. Laws, § 333. It will be seen that the remedy thus provided can be invoked only by the person whose property, or right of possession and personal enjoyment thereof, is affected by the maintenance of a private nuisance, and, as an incident to the compensation which the law awards for the injury sustained, the court may order a warrant to be issued, commanding the sheriff to abate the same, but the statute makes no provision whatever for any relief for an injury sustained from the maintenance of a public nuisance. It is urged with much reason that under the maxim, "*Expressio unius est exclusio alterius*," the remedy prescribed by section 333, *supra*, is exclusive, and that the deduction is strengthened when the remedy thus afforded is considered with reference to the limitation placed thereon by Section 380, Hill's Ann. Laws, which, so far as applicable to the case at bar, reads: "The enforcement or protection of a private right, or the prevention of or redress for an injury thereto, shall be obtained by a suit in equity in all cases where there is not a plain, adequate and complete remedy at law."

In *Fleischner v. Citizen's Investment Co.*, 25 Or. 119 (35 Pac. 174), it was held that the remedy provided by the former section is not exclusive, and does not limit the relief for injury resulting from the maintenance of nuisances to actions at law; that whenever a nuisance will cause irreparable injury, menace the life or health of the plaintiff or his family, or the guilty party is not able to respond in damages for the injury, or where numerous actions will be required, equity has "concurrent jurisdiction with courts of law," within the meaning of the

latter section, and will enjoin the continuance of the objectionable conditions. "In regard to private nuisances," says Judge Story in his work on Equity Jurisprudence (Vol. 2, § 925), "the interference of courts of equity by way of injunction is undoubtedly founded upon the ground of restraining irreparable mischief, or of suppressing oppressive and interminable litigation, or of preventing multiplicity of suits." This learned author, after illustrating the doctrine that equitable interposition in the cases of private nuisances ought not to be granted except where the right is clear, says in the following section: "On the other hand, where the injury is irreparable, as where loss of health, loss of trade, destruction of the means of subsistence, or permanent ruin to property, may or will ensue from the wrongful act or erection,—in every such case courts of equity will interfere by injunction in furtherance of justice and the violated rights of the property." The defendant against whom a judgment has been given in an action for damages resulting from a private nuisance may, upon motion therefor, obtain from the court or judge an order to stay the issuing of a warrant to abate the nuisance for such period as may be necessary, not exceeding six months, and allowing the defendant to abate the nuisance himself, upon giving the plaintiff an undertaking that he will abate it within the time specified in the order: Hill's Ann. Laws, § 335. A private nuisance, however, may in some instances become so intolerable to the party whose property, or the enjoyment thereof, is affected thereby, that its discontinuance becomes an imperious necessity, in which case equity only can afford the immediate relief demanded, because the slow process of the law courts is not adequate to the occasion. It is the inadequacy of the legal remedy referred to in section 380, *supra*, that forms the exception to the gen-

eral rule, and thereby confers upon a court of equity jurisdiction, in a case of private nuisance, to interfere in behalf of the injured party, and to grant speedy relief. Our statute having made no provision for the suppression of a public nuisance, except by indictment, any remedy beyond that, if it exist, must be found in the rules of the common law.

3. "In regard to public nuisances, the jurisdiction of courts of equity," says Judge Story in his work on Equity Jurisprudence (Vol. 2, § 921), "seems to be of a very ancient date, and has been distinctly traced back to the reign of Queen Elizabeth." A court of equity, therefore, has jurisdiction to restrain existing or threatened public nuisances by injunction, at the suit of a private person, who suffers therefrom a special and peculiar injury, distinct from that suffered by him in common with the public at large: 3 Pomeroy, Eq. Jur. § 1349, and cases cited in note 4; 2 Wood, Nuis. § 819. "A house of ill fame, or 'bawdy house,' as it is more commonly called in the law," says Mr. Wood in his work on Nuisances (Vol. 1, § 29), "is a public nuisance, and the keeper thereof may be indicted therefor, whether the house is located in a city or a forest. It is *malum in se*, and the court does not need to be informed of its effects upon society, for the common experience of mankind shows that the probable and natural consequences of such an establishment will be detrimental to the moral and social welfare of the public." To the same effect, see, also, *Givens v. Van Studdiford*, 4 Mo. App. 498.

4. The plaintiffs having sought relief in the proper forum, and their complaint having stated facts sufficient to constitute a cause of suit, the remaining question to be considered is whether the evidence introduced at the trial conclusively shows that they are entitled to the relief which they invoke. The evidence tends to show, and

the court below found, that the proximity of the cribs to Blagen's property may somewhat depreciate its value. The continuance of a nuisance, not such *per se*, which renders the adjacent property less salable, or prevents the owner from advantageously letting the premises, or limits his demise thereof to less reputable tenants, is not enough to entitle him to equitable relief; for the loss sustained in these particulars is capable of being compensated in an action for damages: 1 Wood, Nuis. § 3; 2 Wood, Nuis. § 789; *Ryan v. Copes*, 11 Rich. L. 217 (73 Am. Dec. 106); *Lansing v. Smith*, 8 Cow. 146; *Gibson v. Donk*, 7 Mo. App. 37; *Ballentine v. Webb*, 84 Mich. 38 (13 L. R. A. 321, 47 N. W. 485). In *Hamilton v. Whitridge*, 11 Md. 128 (69 Am. Dec. 184), it is held that a court of equity had jurisdiction to prohibit by injunction a party from erecting a bawdy house, upon a bill filed by private parties, alleging that the close proximity of such a nuisance would deprive them of the comfortable enjoyment of their property, and greatly depreciate and lessen its value. In *Cranford v. Tyrrell*, 128 N. Y. 341 (28 N. E. 514), suit was instituted to restrain the defendant from keeping a house of ill fame; and it was held that an unlawful use of property, which renders the premises of a neighbor unfit for comfortable or respectable occupation and enjoyment, is a private nuisance, against which the protection of a court of equity may be invoked, although the use complained of also constitutes a public nuisance.

In *Hayden v. Tucker*, 37 Mo. 214, suit was brought to enjoin the defendant from keeping jacks and stallions for service in a yard adjoining and in full view of plaintiff's premises, whereby it was alleged that they were depreciated in value and rendered unfit for habitation, and it was held that a court of equity was competent to grant the relief demanded. Mr. Justice WAGNER, in

speaking for the court, says: "A right of action may lie against a party for a nuisance, where a court would not be justified in interfering to remove it by injunction. To authorize the extraordinary interference, there must be such an injury as from its very nature is not susceptible of being adequately compensated by damages at law, or such as from its continuance or permanent mischief must occasion a constantly recurring grievance, which cannot otherwise be prevented but by injunction. And this remedy will be allowed where the injury is material, and operates daily to destroy or diminish the comfort and use of a neighboring house, and the remedy by a multiplicity of actions for the continuance of it would furnish no substantial compensation." These cases, however, related to enjoining nuisances which were *malum in se*, and maintained or threatened to be carried on in a neighborhood chiefly devoted to family residences. A court of equity will not interfere with the continuance of a lawful business in a locality where the buildings are mainly occupied for business purposes, because a few families may reside in the neighborhood: *Gilbert v. Showerman*, 23 Mich. 448; *Doellner v. Tynan*, 38 How. Prac. 176. "Where the nuisance," says Chancellor GREEN in *Holsman v. Boiling Spring Bleaching Co.*, 14 N. J. Eq. 335, "operates to destroy health or to diminish the comfort of a dwelling, an action at law furnishes no adequate remedy, and the party injured is entitled to protection by injunction." To the same effect, see, also, *Ogletree v. McQuaggs*, 67 Ala. 580 (42 Am. Rep. 112). These cases relate to nuisances which were not such *per se*, but the rule so announced can have no application, upon principle, to the continuance of a nuisance which is *malum in se* in a district devoted exclusively to business.

If this were not so, a house of ill fame could be estab-

lished and operated beside a church, in a district in which the buildings were devoted to business or trade, and a court of equity would be powerless to correct the evil. If it were possible for such a thing to exist unmolested in a civilized community, what measure of damages in an action at law would compensate outraged decency, dispel the blush of shame that flushes the cheek of modest virtue, or still the conscience of those who would worship in a sanctuary that was maintained in the least degree by money collected as indemnity from the maintenance of a brothel? All property in a city is affected by the maintenance of a bawdy house, just in proportion to its contiguity thereto, and the damage which such property sustains, while differing in degree, does not differ in kind; and, such being the case, the owner of any such property affected in the same general way as other property therein could not successfully invoke equitable relief to enjoin its continuance. But where, by reason of the proximity of such property to the public nuisance, disgusting scenes and sounds shock the sense of those whose property, or the enjoyment thereof, is affected thereby, the injury sustained is necessarily different in kind from that suffered by the public at large; and, this being so, such persons are entitled to an injunction restraining the same.

One of the witnesses who appeared on plaintiffs' behalf, in speaking of the occupant of a crib in the immediate vicinity of Blagen's property, in answer to the question, "What would the appearance of these women indicate was their occupation?" says: "Why, it is self-evident that they are on the town. For instance, several weeks ago I was walking along there about 6:30 or 7, and the windows were out,—fully open,—and one of the Japanese women was standing around in undress uniform, and several Chinamen were standing around,

negotiating, apparently, on the outside." This evidence, in our judgment, together with other like testimony, tends to show that plaintiffs are entitled to the relief demanded, and hence the decree is reversed, and the temporary injunction made perpetual.

REVERSED.

Decided 27 March; rehearing denied 22 May, 1899.

RAMSEY v. STEPHENSON.

[56 Pac. 520; 57 Pac. 195.]

WILLS—CONSTRUCTION.—Where a testator directed his residuary estate to be converted into cash, and divided "equally among the heirs at law," such heirs take per capita, and not *per stirpes*, regardless of the degree of relationship to the testator: *Gerrish v. Hinman*, 8 Or. 348, distinguished.

From Multnomah: LOYAL B. STEARNS, Judge.

Bill by James S. Ramsey and others against Effie I. Stephenson and others to have set apart to them, as devisees, their distributive share in the estate of Frederick H. Ramsey, deceased. From a decree dismissing their bill, complainants appeal.

REVERSED.

For appellants there was a brief over the names of *Whalley & Muir*, with an oral argument by *Mr. William T. Muir*.

For respondents there was a brief over the names of *Paxton, Beach & Simon*, *W. E. Jeffrey*, *Lionel R. Webster*, *E. B. Prebble*, and *Roscoe R. Giltner*, with an oral argument by *Messrs. Jarvis Varnal Beach* and *Lionel R. Webster*.

MR. JUSTICE BEAN delivered the opinion.

The only question in this case is the proper construction of that portion of the ninth clause in the will of Frederick H. Ramsey, deceased, which reads as follows: "I give, devise, and bequeath all the rest and residue of my property, real, personal, and mixed, of which I may die seised, unto the said A. W. Lambert, in trust, nevertheless, to sell and dispose of the same, and to convert it into cash, and divide the proceeds equally among the heirs at law." At the time of the testator's death he left, surviving him, a brother and sister, six children of a deceased brother, five children of one deceased sister, and six children of another; and the question is whether these heirs take per capita, or by right of representation. There is nothing in the other provisions of the will, or the surrounding circumstances, throwing any light on the testator's intention; but it must be gathered from the clause quoted.

For the plaintiffs it is contended that the money realized from the sale of the residue of the estate of the decedent should be distributed among the nineteen heirs in equal parts, while the defendants contend that it should be divided into five parts, and distributed *per stirpes*, and not per capita. The argument on both sides is based to some extent on decisions, some of which are in point on each theory. The courts all agree, however, that the intention of the testator must govern, if it can be ascertained from the language used, and that analogous decisions are of importance only as aids in ascertaining such intention, when it is doubtful. It may, perhaps, be stated as a general rule that, under a devise to heirs, without naming them, which therefore necessarily compels a reference to the statute of distribution to ascertain who shall take under the will, the devisees will take in the proportion prescribed by the statute, and, if not of equal degree, they will take by right of

representation, or *per stirpes*, and not *per capita*, in the absence of a declaration in the will to the contrary, or in case the intention of the testator is in doubt: *Richards v. Miller*, 62 Ill. 417; *Dagget v. Slack*, 8 Metc. (Mass.) 450; *Bassett v. Granger*, 100 Mass. 348; *Bailey v. Bailey*, 25 Mich. 185; *Conklin v. Davis*, 63 Conn. 377 (28 Atl. 537); *Wood v. Robertson*, 113 Ind. 323 (15 N. E. 457); *West v. Rassman*, 135 Ind. 278 (34 N. E. 991); *Woodward v. James*, 115 N. Y. 346, 359 (22 N. E. 150); *Eyer v. Beck*, 70 Mich. 179 (38 N. W. 20). This rule is founded on the presumption that the testator, having made a resort to the statute necessary to ascertain who are his beneficiaries, intended that it should also govern the proportion in which they should take, unless he expressed a different intention. But when he prescribes the mode of distribution there is no room for presumption, and it must be made as he directs.

Now, in the case at bar, the language of the will indicates clearly the intention of the testator as to the manner of distribution, because he expressly declares that it shall be made "equally" among the heirs at law, and this direction must prevail: *Scudder v. Vanarsdale*, 13 N. J. Eq. 109; *Allen v. Allen*, 13 S. C. 512 (36 Am. Rep. 716); *Maguire v. Moore*, 108 Mo. 267 (18 S. W. 897); *Bisson v. West Shore R. R. Co.*, 143 N. Y. 125 (38 N. E. 104); *McKelvey v. McKelvey*, 43 Ohio St. 213 (1 N. E. 594); *Johnstone v. Knight*, 117 N. C. 122 (23 S. E. 92); *Brittain v. Carson*, 46 Md. 186. Under the terms of the will, resort to the statute is necessary to determine who are the persons entitled to take, but not to ascertain how they shall take. By the phrase "heirs at law" the testator designated his devisees, and by the word "equally" the manner in which they should take. It is difficult to conceive what language the testator could have used better adapted to make his intention manifest.

He directs that his trustee shall sell and dispose of the residue of his estate, and divide the proceeds equally among his heirs ; and we do not feel justified in substituting for his declared will a mode of distribution by which his property will not be so divided. It is true some of the authorities cited by defendants do not support this conclusion : *Baskin's Appeal*, 3 Pa. St. 304 (45 Am. Dec. 641) ; *Hoch's Estate*, 154 Pa. St. 417 (26 Atl. 610) ; *Kelley v. Vigas*, 112 Ill. 242. These cases proceed upon the theory that because the statute of distribution has to be consulted in order to ascertain who are heirs it must also govern as to the manner of the distribution, notwithstanding the language of the will. This reasoning overlooks the fact that the testator himself has indicated the *quantum* of the estate which each heir shall take, and that it is only necessary to consult the statute for the purpose of determining who are heirs. In other words, the statute governs in ascertaining who shall take, but the will controls in determining the *quantum* to which each beneficiary is entitled. There is, therefore, no necessity for resorting to the statute to ascertain the manner of the distribution ; nor can it be done, it seems to us, without disregarding the expressed intention of the testator. It follows, from these views, that the decree of the court below must be reversed, and it is so ordered, and the cause remanded, with directions to overrule the demurrer to the complaint.

REVERSED.

ON MOTION FOR REHEARING.

MR. CHIEF JUSTICE WOLVERTON delivered the opinion.

In the able and exhaustive petition for a rehearing of this cause counsel for respondents strongly insist that the opinion therein impinges upon, and practically overrules, *Gerrish v. Hinman*, 8 Or. 348, but we are impressed that such is not its effect. That case was not alluded to, as it was thought not to be in point, although it received due consideration among the many other cases cited. It is needless to say the authorities are in hopeless conflict touching the proper distribution to be made under a bequest or devise of similar import to the one here exhibited, so that it would be a bootless task to attempt to reconcile them. The testator has directed the trustee to "divide the proceeds equally among the heirs at law," and the question is, simply, if we may be pardoned a restatement of it, whether the heirs at law take per capita or *per stirpes*. The general rule, unquestionably, is that a gift to a class, without direction as to the *quantum* each shall take, entitles all persons who are able to bring themselves within the class, to a distribution per capita. But, if a gift be to a class unascertainable, except by resort to the statute of distribution, then, in the absence of specific directions, the provisions of the statute will control as to the proportion in which the donees shall take, and the distribution will be *per stirpes*: *Freeman v. Knight*, 37 N. C. (2 Ired. Eq.) 72; *Allen v. Allen*, 13 S. C. 512 (36 Am. Dec. 716). The authorities are thus far in accord, and language showing a different intention must be employed by the donor to warrant a departure from these rules in the distribution of his bounty. It is a

cardinal principle in the construction of wills that the intention of the donor must always prevail whenever it can be ascertained. By the simple designation "heirs at law," as a description of the objects of his bounty, the testator has left no alternative except a resort to the statute of distribution by which to determine who shall take. We find, by reference to the statute, that his brother, sister, nephews, and nieces all come within the category of "heirs at law," as, without the will, they are all capacitated to share in his estate. The statutory distribution is *per stirpes*, and, without apt words showing an intention to the contrary, it must be conceded that, under the rule, the kindred designated would take accordingly. But the word "equally" has been employed, and the pivotal question is respecting its appropriate significance. We are bound to assume that it was employed for some purpose.

The primary object of making a will is to direct a different and distinct mode of distribution of the testator's estate from that marked out by the law of descent, and if, after specific bequests, it is desired to have a residuum distributed according as the law directs, there are two ways of doing it, which would certainly be commensurate with the purpose,—one is to make no attempt at a testamentary distribution of it; and the other, to direct simply that it be distributed among the heirs at law. In its ordinary acceptation, the word "equally" signifies a division of the estate *per capita* (*Kelly v. Vigas*, 112 Ill. 242, 245), and we are not aware that it has any technical meaning of different import. Its use by the testator, therefore, is indicative of an intention that the funds should be distributed *per capita*; and, since the word has been employed, the *per capita* distribution must be adopted, unless, notwithstanding such use, an intention is discoverable from the will that the donees should take

per stirpes. To this end the adjudications of Illinois and New York are in harmony: *Kelly v. Vigas*, 112 Ill. 242, 245, and *Bisson v. West Shore R. R. Co.*, 143 N. Y. 125 (38 N. E. 104). The respondents, therefore, have the burden upon them to show, from the language of the will, that the testator intended a distribution *per stirpes*; and this it is impossible to do, as the clause referred to is the only one in the whole instrument shedding any light on the question. This conclusion seems to us to be deducible from correct principles, and is supported by a strong array of respectable authority.

The other contention is that the word "equally" has reference to the statutory distribution, and that, in view of the statute, it would be an equal distribution if primarily the fund is divided into equal shares, notwithstanding the necessity of subdividing one or more of such shares before the donees can be requited: *Hoch's Estate*, 154 Pa. St. 417 (26 Atl. 610). This is certainly attaching to the word "equally" a strained and unwarranted signification, and it seems to us that it should not be given such meaning or import unless the intention of the donor to have it so construed is discoverable from the will itself, and that its mere use, without else, is indicative of a *per capita*, and not a *per stirpes*, distribution. *Gerrish v. Hinman*, 8 Or. 348, was decided in harmony with these views. The purpose of the testator in that case was discoverable from the will. Mr. Justice PRIM says: "The objects of his bounty are designated as his living children, and the 'children of deceased daughters.' The number and names of the latter are not mentioned in the will, but are merely referred to as a class in their representative capacity; thus evincing the purpose of the testator to give them the shares their mothers would have taken if they had survived him." In support of his position, the learned justice cites *Lockhart v. Lockhart*,

3 Jones, Eq. (N. C.) 205. In *Lowe v. Carter*, 2 Jones, Eq. (N. C.) 377, where the property was directed to be sold, and the proceeds of said sale to be equally divided between the bodily heirs of his three daughters, Elizabeth, Sarah, and Catharine, it was held, upon like principle, that the distribution should be *per stirpes*; and to same effect see *Bivens v. Phifer*, 47 Jones, Law, 436. Notwithstanding, it was determined by a late authority from the same state that the words, "to be equally divided," used in a will, require a distribution of the property *per capita*: *Johnston v. Knight*, 117 N. C. 122 (23 S. E. 92). In that case the provision in the will was as follows: "And the balance of my estate, both real and personal, be equally divided between William T. Knight, Pattie McDowell, and the children of J. P. and Margaret L. Sugg, and the children of Elisha McDowell;" and the distribution was directed to be made *per capita*. The court said, among other things, that "the words 'equally divided' do not absolutely control in all instances, but yield only when other language of the will or the manifest intent requires it. The argument, based on justice and natural affection, does not change the rule. That would disturb other parts of the will. Testators usually divert the line of distribution from that marked out by the law of descent and distribution, and no doubt do so 'in the light of surrounding circumstances.'" There is no intimation in the opinion that the earlier cases were in conflict with the views therein entertained.

So, it was early held in South Carolina, under a provision in a will directing the rest and residue of the testator's estate not theretofore disposed of to be equally divided among the "above-named heirs," that the distribution should be made *per stirpes*, because it was ascertainable from the instrument that such was the purpose of the testator: *Collier v. Collier*, 3 Rich. Eq. (S. C.)

555 (55 Am. Dec. 653). But in a much later case, where the testator directed the rest of his estate to be converted into money and "equally distributed among his heirs at law, share and share alike," it was decided that the distribution should be per capita, and the court observed that *Collier v. Collier* "was not in point," although it was thought by counsel to be controlling: *Allen v. Allen*, 13 S. C. 512. These cases illustrate very clearly the distinction that exists between the case of *Gerrish v. Hinman*, 8 Or. 348, and the one at bar, and give ample support to the conclusion we have reached. Having carefully reviewed all the authorities to which our attention has been specially attracted, with many others, we feel convinced that a rehearing would not bring about any different result. The petition for rehearing must therefore be denied.

REHEARING DENIED.

34	416
44	478

Argued 18 March, 1898; decided 13 February; rehearing denied 13 March, 1899.

THOMAS v. BARNES.

[56 Pac. 73.]

1. JOINT AND SEVERAL JUDGMENT—JOINT BOND.—In an action on a bond of indemnity given by several parties, a recovery must be had against all or none, unless one or more has set up and maintained a defense personal to himself.
2. INDEMNITY TO OFFICER—DEFENSE.—Where several attaching creditors give a bond to the sheriff conditioned that, if he will hold certain attached property against all claimants, defendants will indemnify him against any loss or damages by reason thereof, a direction to release one or more attachments would constitute no defense, the liability not being severable.

From Multnomah: E. D. SHATTUCK, Judge.

Action by Al Thomas against F. C. Barnes, the Oregon Ice Company, and H. F. Gullixson, to recover damages for the breach of a bond. Plaintiff appealed from a judgment against him.

REVERSED.

For appellant there was a brief over the names of *Hume & Hall* and *Glen O. Holman*.

For respondent there was a brief over the names of *Frank V. Drake* and *Fred. R. Strong*.

MR. JUSTICE BEAN delivered the opinion.

This is an action upon an indemnifying bond, given by the defendants to the plaintiff, as Constable of South Portland District in Multnomah County. The complaint, after alleging the commencement by the several defendants of separate actions in said justice's court against one Sengfelder, and the seizure by the plaintiff, as such constable, of certain property belonging to Sengfelder under writs of attachment issued in such actions, further avers that one William Thompson demanded possession of such property, and threatened to bring an action against the plaintiff to recover the same; that, in order to indemnify plaintiff against such threatened action, the three defendants, F. C. Barnes, H. F. Gulixson & Co., and the Oregon Ice Co., jointly executed and delivered to him a bond conditioned that, if he would retain possession of such property, and refuse to deliver it to Thompson, they would save him harmless from all damages, costs, and expense by reason thereof. The complaint then alleges that thereafter Thompson began an action against the plaintiff to recover possession of such property, which resulted, after a trial on the merits, in a judgment in his favor for the recovery thereof, or, if a delivery could not be had, then for the sum of \$1,910.40, the value thereof, and the further sum of \$260.56 damages for its detention, and for the sum of \$89.35 costs and disbursements; that, before the commencement of this action, the plaintiff was compelled to

and did pay such judgment, and that he has demanded of the defendants that they reimburse and save him harmless, but they have refused to do so.

The defendant Barnes answered separately, denying all the material allegations of the complaint, and for a further and separate defense alleged that, while it may be true that Thompson obtained judgment against the plaintiff for the recovery of the possession of the property seized under his writ of attachment against the property of Sengfelder, he was not notified of the commencement or pendency of the action therefor, and was not given an opportunity to make any defense thereto, and did not know of Thompson's judgment until after it had been entered; that he has been informed, and believes and charges the fact to be, that none of the defendants herein were notified of the pendency of such action prior to the entry of judgment therein, and that there were good and substantial defenses thereto on the merits which the plaintiff willfully and negligently omitted to interpose; and further alleged that he received no consideration for the execution of the pretended writing or instrument set forth in the plaintiff's complaint, and in this behalf avers that on or about the seventeenth of February, 1892, he commenced an action in the Justice's Court for South Portland Precinct against Sengfelder, and procured a writ of attachment to be issued, and placed in the hands of a deputy sheriff for service; that he had no knowledge of the facts attending the service of the writ, and that some days subsequent thereto the plaintiff came to him with a writing, which he requested him to sign, with other persons, accompanying his request with the declaration that he had attached the property of Sengfelder under several writs of attachment, including that of defendant, and was holding possession thereof under said writs, and de-

sired to be indemnified ; that several persons, including H. F. Gullixson, Portland Ice Company, Muirhead & Murhard, W. H. Butterfield, and M. A. Gunst, had severally commenced actions against Sengfelder, and caused writs of attachment to be issued, which he held, and that they were all to unite in the execution of the bond in question ; that he believed such representations of the plaintiff to be true, and relied thereon, and with the express understanding that all of said persons should sign the bond or writing, and that it should become effectual only on condition of their so doing, he signed the same, and therefore that such pretended writing is not his bond. As a bar to this action he sets up the proceedings and decree in a suit brought by one P. A. Marquam in the Circuit Court for Multnomah County against Sengfelder and others, including the parties hereto.*

The Oregon Ice Company and Gullixson & Co. each filed a separate answer, which, in addition to the denials and averments as in the answer of Barnes, alleges that, having been informed and notified by the plaintiff that Thompson was about to commence legal proceedings to obtain possession of the goods and merchandise seized by the plaintiff under the writs of attachment issued in the several actions brought by them against Sengfelder, they each notified and informed him that they would release and relinquish any and all claims or right in and to said goods, wares, and merchandise by reason of such attachments, and then and there directed the plaintiff to release the same ; that they made no claim to the goods, or any part thereof, and that the plaintiff incurred no expense or costs, nor was he in any way damaged or injured, by reason of any claim or demand made by either of these defendants to such goods, wares, and merchandise. The reply put in issue the allegations of the sev-

*NOTE.—The case here referred to is *Marquam v. Sengfelder*, —OR.—REPORTER.

eral answers, and upon the trial the jury returned a verdict in favor of the defendants, the Oregon Ice Company and H. F. Gullixson & Co., and against the defendant, Barnes, for the sum of \$2,681.93. Upon this verdict the court rendered judgment in favor of the ice company, and against Gullixson & Co. for their costs and disbursements, and subsequently, on motion of Barnes, set aside the verdict and dismissed the action as to him, on the theory that the judgment in favor of Gullixson & Co. and the ice company operated as a release of him.

1. It will be observed from the statement of the issues that this is an action upon a joint undertaking executed by the three defendants, and, therefore, that a recovery must be had against all or none, unless one or more of them has set up and maintained a defense personal to himself; and such does not seem to have been the case in this instance. Each of the defendants admits in his answer that he signed the instrument upon which this action is based, but all claim that it was signed under misrepresentations and misstatements, and all plead other matters which they claim go in bar of the action. These defenses are common to all of the defendants, and, if successfully maintained by either, ought to have resulted in a verdict in favor of all.

2. The additional separate defense attempted to be set up by the Oregon Ice Company and Gullixson & Co., to the effect that, when they were informed that Thompson had asserted and was about to enforce his claim to the attached property, they directed the plaintiff to release and relinquish it so far as their writs were concerned, would constitute no defense to an action upon the bond or undertaking, because their liabilities were not severable, and did not depend upon the separate attachments. The bond is conditioned that, if the plaintiff will retain possession, and proceed to a sale of the prop-

erty under any of the attachments referred to therein, the defendants will indemnify him against any loss or damage by reason thereof, and therefore a mere direction to release one or more of the attachments would constitute no defense to this action.

It is claimed by the plaintiff that, in addition to the defenses pleaded in the several answers which are common to all, the defendants the Oregon Ice Company and Gullixson & Co. each pleaded a defense going to the merits of the whole case as to them, and this is sought to be maintained on the theory that the answers deny that such defendants signed or executed the bond in suit. But the denials of the answer must be construed in connection with the affirmative and separate defenses, and, as so construed, it amounts to a denial that they executed the bond in question because they signed it relying upon the representations of the plaintiff that other parties were to join in the execution thereof, and for this reason it never became their bond or obligation. Upon what theory the jury proceeded in arriving at their verdict, or what the views of the trial court were upon the law of the case, is not disclosed by this record. We have nothing before us but the pleadings, verdict of the jury, and the judgment rendered thereon, and the statement in the bill of exceptions that upon the trial the respective parties introduced evidence tending to prove all the issues made in the pleadings, and also tending to show that after the execution of the instrument mentioned in the complaint, the defendants the Oregon Ice Company and Gullixson & Co. directed the plaintiff to release and no longer hold for them the property claimed by Thompson. Under this record the verdict as returned was unauthorized by the pleadings, and the court erred in rendering any judgment thereon. Reversed, and remanded for a new trial.

REVERSED.

Argued 11 January; decided 20 March, 1899.

WHITE v. LADD.

[56 Pac. 515.]

1. AMENDING RETURN ON SUMMONS.—Upon a proper showing a court may permit an officer to amend his return so that it shall conform to the truth; as, for example, to show the date of the receipt of a summons, where the date stated in the return is wrong.
2. ABATEMENT AND REVIVAL—TIME FOR APPLICATION.*—A revival of an action against the personal representatives of a deceased defendant may be made at any time, if the application therefor is filed within a year from the death: *Dick v. Kendall*, 6 Or. 166, cited.
3. NOTICE TO SUBSTITUTED PARTIES.—Where an original defendant was not served with summons, and had not appeared at the time of his death, the personal representative is not entitled to notice of an application for an order of continuance.
4. SUBSTITUTION FOR DECEASED PARTY.—The personal representative of a deceased defendant who died before being served with summons, is substituted in his stead by the making of an order allowing an amended complaint to be filed in which the representative is named as a defendant, and directing service on her of the order, the amended complaint, and an alias summons.
5. ADMINISTRATOR—ATTACHMENT LIENS—PRESENTING CLAIM.†—A creditor who has acquired an attachment lien before the death of the defendant does not lose his right to enforce such lien by presenting the claim on which the action was based to the administrator of the deceased and having it allowed: *Teel v. Winston*, 22 Or. 489, cited and applied.

From Multnomah: E. D. SHATTUCK, Judge.

The following is a brief narrative of the facts leading to the commencement of this action, and the steps subsequently taken material to an understanding of the controversy. On April 16, 1894, Isam White filed his complaint against A. H. Johnson, to recover upon certain

*NOTE.—This is with reference to Section 38, Hill's Ann. Laws, which, so far as is material here, reads: " * * In case of the death, marriage, or other disability of a party, the court may at any time within one year thereafter, on motion, allow the action to be continued by or against his personal representatives, or successors in interest."—REPORTER.

†NOTE.—See, in this connection, *Kellogg v. Miller*, 22 Or. 406 (29 Am. St. Rep. 618, and note), where a secured creditor presented his claim against the estate of an insolvent, without first exhausting the security.—REPORTER.

promissory notes. At the same time an affidavit and undertaking were filed, and a writ of attachment issued. The writ was executed at 3 o'clock P. M., and at 7 P. M. the defendant Johnson died. On May 29, 1894, plaintiff filed his affidavit showing the above facts, and that at the time of filing the complaint, and prior to the issuance of the attachment, he had caused a summons to be issued in said action, and that Cordelia Johnson, widow of the said A. H. Johnson, was thereafter appointed executrix. Based upon this affidavit, an order was made on May 31, 1896, continuing the action against the executrix. The order further directed that a copy thereof and of the complaint be served upon her, and that she be required to plead to the complaint within ten days after such service, which was had June 2, 1894. The original summons, entitled, "Isam White v. A. H. Johnson," when returned into court was indorsed as follows: "Received April 17, 1894, Penumbra Kelly, sheriff, by C. H. Chance, deputy;" "Received April 17, 1894, Penumbra Kelly, sheriff, by P. A. Marquam, deputy." On June 12, 1894, Cordelia Johnson, through her attorneys—they appearing specially for the purpose of the motion only—moved the court to set aside the proof of service of the summons and the order continuing the cause against her as the personal representative of A. H. Johnson, deceased, which motion was overruled on June 19, 1894. Subsequently the sheriff so amended his return upon the summons as to show the service thereof upon Cordelia Johnson, and on the twenty-seventh of June judgment by default was entered against her as the substituted defendant, and from said judgment she prosecuted an appeal to this court. The judgment being reversed and the cause remanded to the lower court (*White v. Johnson*, 27 Or. 282, 50 Am. St. Rep. 726), the plaintiff, on April 9, 1896, moved the court for an order vacating the judg-

ment theretofore rendered in said cause and modifying the previous order whereby Cordelia Johnson, the said executrix, was made a party defendant, and that he be permitted to file an amended complaint against her and have an *alias* summons issued, directing the manner of service and time of her appearance as such substituted defendant, and that such modified order be entered *nunc pro tunc* as of the date of the former order. The order was accordingly made, but was subsequently vacated on the motion of Mrs. Johnson. On June 11, 1896, upon the application of Penumbra Kelly, the former Sheriff of Multnomah County, he was given leave to amend the indorsements upon the original summons so as to conform to the facts, and show that it was received by him upon the sixteenth, instead of the seventeenth, day of April, 1894, and thereupon, and on the second day of July, 1896, the plaintiff renewed the motion, and an order was granted, in purport the same as that of April 9, except it was not directed to be entered *nunc pro tunc*. After service of the amended complaint and the *alias* summons, Mrs. Johnson, appearing specially, again moved the court to set aside the return of service of the summons, and to vacate its order allowing the amendment of the complaint and the issuance of the summons, providing the manner of service, and directing a modification of the former order of substitution, and permitting the action to continue against her. This motion was overruled, and, the plaintiff having again taken judgment by default, Mrs. Johnson appealed. Mrs. Johnson having died since the appeal, William M. Ladd has been substituted as defendant.

AFFIRMED.

For appellant there was a brief over the name of *R. & E. B. Williams*, with an oral argument by *Mr. Emmett B. Williams*.

For respondent there was a brief over the name of *Cox, Cotton, Teal & Minor*, with an oral argument by *Mr. Wirt Minor*.

MR. CHIEF JUSTICE WOLVERTON, after making the foregoing statement of the facts, delivered the opinion.

1. The first assignment of error relied upon is that the court was not warranted by the facts in permitting the former sheriff to so amend his indorsement upon the old or original summons as to show that he received such summons on the sixteenth, rather than on the seventeenth day of April, 1894. It seems to be conceded that the court had the power to permit the amendment, but it is contended that the facts upon which it was made were insufficient to support its action in that regard. The application for leave to amend was based upon the affidavits of the former sheriff and Charles H. Chance, his deputy. Chance swears that there were delivered to him, in the cause, the following papers, viz., original summons, copy of complaint, and writ of attachment, on the sixteenth day of April, 1894; that the summons and copy of complaint were delivered to him by Mr. Wirt Minor, and that the writ of attachment was delivered on the same day, and that he personally entered the date of the receipt of such papers in a book kept for that purpose, at page 25 thereof, on the sixteenth day of April, 1894; that the book so shows; and that the indorsements upon the summons showing the receipt thereof upon the seventeenth were clerical errors, and did not correctly state the fact. Kelly deposes to the effect that

he kept such a book as was referred to by Mr. Chance, the deputy, and that it shows, by an entry made therein in the handwriting of Chance, that said summons was received by him on the sixteenth, as was also the writ of attachment, and that he believed, from such evidence, that the indorsements, in purport that said summons was received on the seventeenth, were clerical errors, and should have read the sixteenth, instead. There was nothing to contradict these statements except the two indorsements referred to; and it is very apparent that the showing was amply sufficient to overcome the *prima facie* case made thereby, and to warrant the court in permitting the amendment.

It is next contended that the proceedings for a continuance of the cause did not support the order therefor. Several reasons are assigned: First, because the motion to have the cause continued was not made within the year; second, that the motion filed on May 29, 1894, for a continuance against the personal representative of A. H. Johnson, deceased, and all subsequent motions for that purpose, were without notice to the defendant Cordelia Johnson, as executrix; third, that the order of May 31, 1894, having been held erroneous by this court, it could not be revived or supplemented upon such motion, nor could it be remodeled or amended after the year; fourth, the action was not in fact continued by the proceedings had, and the directions contained in the order of the court. In the opinion rendered when this cause was first here, it was held that, as the summons had not been served upon A. H. Johnson, it was necessary to serve it upon the substituted defendant, after the cause had been continued against her; and, this not having been done, the judgment was reversed. But the order of substitution was neither set aside nor vacated. It was intimated, however, that the allowance of the provisional

remedy, upon the record then exhibited, was without authority of law, and void, and that the court was in error in granting the order allowing the action to be continued against the personal representative, upon that record; but the order itself was not disturbed in the reversal of the judgment. The opinion shows, *White v. Johnson*, 27 Or. 282 (50 Am. St. Rep. 726, 40 Pac. 511), that we did not deem the question of substitution properly here at that time, but gave our views touching it, anticipating its return upon a subsequent appeal. The order of substitution, therefore, stood unaffected by the reversal of the former judgment. In this view there could arise no question, as it regards the time within which the application for the substitution was made, as the order therefor was secured and actually entered within the year. If it may be said, however, that the effect of the reversal of the judgment was to vacate the order of substitution at any rate, it left the motion for continuance pending. Taking this for the condition of the record when remanded, we will inquire whether the substitution was accomplished by what was subsequently done.

2. It appears to be conceded that, if the application for the continuance was made within the year, it was sufficient upon which to revive the action, within the authority of *Dick v. Kendall*, 6 Or. 166. The plaintiff has brought himself within the doctrine of that case, unless it was necessary, before the order of substitution could have been made and entered, that the executrix should have had notice of the pendency of the application for substitution, where a party to the record died after he had been duly served with summons, and regularly brought into court.

3. The reason for directing that a party sought to be substituted be notified of the proceeding in such case is

to afford him an opportunity for being heard upon the propriety of making the order of continuance as against him. The issues of the case remain the same after the substitution as before, and such party is entitled to be heard only in opposition to the order: *Dunham v. Carson*, 42 S. C. 383 (20 S. E. 197). But when, as in this case, the original defendant has never been served or appeared in the action, it is quite apparent that, if the substituted party is the person to be served with summons, and jurisdiction of the person is thereby to be first acquired, he can make the same defense upon his appearance that he could have made in the first instance to the application for substitution. So that there is no reason for applying the rule of notice to the executrix in this case.

4. Touching the status of the order of substitution of May 31, 1894, the amendment of the indorsements upon the summons made by the ex-sheriff by leave of the court, showing the receipt of it by him upon the sixteenth day of April, instead of the seventeenth, 1894, constituted a record which established the jurisdiction of the court for the allowance of the provisional remedy, and therefore the jurisdiction to make the order of substitution had been acquired. The amendment related back, and took effect as of the date of the receipt of the summons, and the record stands as if regularly made up; and the jurisdiction is therefore apparent. If, however, the effect of the reversal of the former judgment was to revoke the order of substitution, then the order subsequently made is deemed sufficient to accomplish the continuance of the cause against the executrix, when the proceedings are read in their entirety. The plaintiff was given leave to file an amended supplemental complaint, making Cordelia Johnson defendant, and to issue an *alias* summons running against her in her represen-

tative capacity, with directions to have her served with a copy of these papers, together with a copy of the order in the premises. All this was surely sufficient to accomplish the continuance. The executrix was thereby made a party to the proceeding, and required to answer the complaint as such; and we think it operates, unquestionably, to the accomplishment of a valid substitution. If she was not a proper party defendant, she had ample opportunity to present that question; but the substitution was had by the proceeding adopted as fully as if the order set it out in the plainest terms possible.

5. The defendant further insists that plaintiff is debarred of his right to further prosecute his action by reason of the fact that he had presented the claim upon which the action was based to her, as such executrix, for allowance against the estate, and the same had been duly allowed. The contention is that the presentation and allowance are, in all essentials, a judgment, and are, therefore, a bar to the prosecution of the cause for the obtainment of a judgment in any other form. Whether such an allowance has the effect of a judgment, or not, it is not necessary for us to determine at this time. The plaintiff acquired a lien, by reason of the attachment, prior to the decease of Johnson, which he has a right to perpetuate and enforce, and at the same time present his claim against the estate of the decedent, and insist upon his rights as a general creditor. It has been decided in *Verdier v. Bigne*, 16 Or. 208 (19 Pac. 64), that a suit may be maintained to foreclose a mortgage after a claim for the money secured by it has been presented, and allowed by the administrator; and the further proposition is deducible from the authorities that such a claim must be presented to the executor or administrator within proper time, the same as other claims, if the claimant would mature his right to require the payment of any defi-

ciency that might remain after the application of the mortgage security upon the demand : *Teel v. Winston*, 22 Or. 489 (29 Pac. 142); 2 *Wærner*, Adm'n., § 409; *Allen v. Moer*, 16 Iowa, 307; *Hill v. Townley*, 45 Minn. 167 (47 N. W. 653). In so far as it may pertain to a demand secured by mortgage, it would seem to be settled law that the claimant may prosecute his foreclosure, and at the same time present his claim against the estate for allowance and payment in due course of administration, and that the presentment and allowance would not bar the proceeding upon the foreclosure. Having caused the property of the defendant to be attached, there was but one course to pursue by which to secure the fruits of the lien thereby acquired, and that was to prosecute the action to judgment, and procure an order for the sale of the attached property. An action had been commenced, and the lien secured, prior to the death of Johnson, and his death could not deprive plaintiff of any right he had theretofore obtained; so that his right to proceed to judgment was unquestionable. If, however, he believed his security insufficient to satisfy the demand, or whether such was the case or not, his right to present the same to the executrix, so that he might share in the general assets in the due course of settlement, is also clear. If such a presentation and allowance of the claim or demand will not bar a foreclosure, it is difficult to see how they will bar the prosecution of an action to judgment for the purpose of enforcing the lien acquired by way of attachment in the lifetime of decedent. The analogy between the two cases is obvious; hence, we are impelled to the conclusion that the presentment to and the allowance of the demand by the executrix were not a bar to the further prosecution of the pending action.

AFFIRMED.

Argued 26 January; decided 20 March, 1899.

SCHOOL DISTRICT v. IRWIN.

[56 Pac. 413.]

1. **SCHOOLS—APPEAL FROM DECISION OF COUNTY SUPERINTENDENT.**—An appeal from an order of a county school superintendent to the State Superintendent of Public Instruction is not authorized by Section 2569, Hill's Ann-Laws, empowering the latter to exercise a general superintendence of the county and district school officers, and the public schools of the state, or section 2572, providing that he shall decide, without costs to the parties appealing, all questions and disputes that may arise under the school laws of the state.
2. **SCHOOLS—PETITION FOR WRIT OF REVIEW.**—The circuit court does not acquire jurisdiction under Hill's Ann. Laws, § 584, to review the acts and determination of the county school superintendent by a petition for a writ of review describing definitely and certainly the determination of the State Superintendent of Public Instruction on an alleged appeal from such county school superintendent, who is made a party, and whose determination is set out, where the only error alleged is that relating to the decision of the State Superintendent of Public Instruction. If the petitioner desired to review the acts of the county superintendent, he should have alleged the errors committed by that official.

From Douglas: J. C. FULLERTON, Judge.

This is a proceeding by writ of review, instituted by School District No. 116 for the purpose of having reviewed the action of the Hon. G. M. Irwin, Superintendent of Public Instruction, in reversing and setting aside the order of Douglas Waite, County School Superintendent of Douglas County, Oregon, made and entered November 20, 1896, relating to a change in the boundary of district No. 16, which eliminated a portion of said district. The plaintiff district was subsequently created, embracing within its boundaries, with other territory, the eliminated portion of district No. 16. The other plaintiffs, C. S. Miller and S. L. Dillard, are residents, taxpayers and legal voters of the new district. The Hon. G. M. Irwin, Superintendent of Public Instruc-

tion, Douglas Waite, School Superintendent of Douglas County, and School District No. 16, are made parties defendant.

It appears from the petition for the writ, and the returns thereto, that, on November 20, 1896, a petition was presented to the county school superintendent, signed by twenty-nine persons, praying a change in the eastern boundary of district No. 16, and upon the same day he made an order reciting that, "In pursuance of the petition now on file in the office, and signed by a majority of the legal voters in School District No. 16 of Douglas County, Oregon, the eastern boundary thereof is changed to read as follows,"—designating the boundary. On December 4 two of the directors of said district filed with the superintendent a motion, based upon affidavits, to set aside the order of November 20, assigning as a reason therefor that the petition upon which the order was based did not contain a majority of the legal voters of the district. Counter-affidavits were filed on December 7, and on December 8 the superintendent made the following order with reference thereto: "The above motion is overruled for want of evidence in proof of matter therein alleged, and for want of authority to adjudicate in the matter." On December 16 a notice of appeal from the action of the school superintendent was filed with the Superintendent of Public Instruction, whereupon the latter notified the county school superintendent of such appeal, fixed a day for taking testimony, and, in pursuance thereof, took and heard testimony in the matter, and, on January 30, rendered his decision, reversing, setting aside and vacating the said order of November 20. It is alleged in said notice of appeal that a remonstrance, containing a greater number of names than appeared upon the petition, was left at the office of the county school superintendent on the twenty-first,

and his attention attracted thereto on the twenty-third of November, 1896, and that he refused to pass upon the same; but these alleged facts do not appear in the returns.

The court below, without looking into the proceedings on appeal to the Superintendent of Public Instruction, determined that the act of the county school superintendent was void and made without authority of law, reversed the action of that officer directly, and vacated his order changing the boundary of said district No. 16. From this action of the court the plaintiffs appeal to this court.

REVERSED.

For appellants there was a brief over the names of *O. P. Coshow* and *J. W. Hamilton*, with an oral argument by *Mr. Coshow*.

For respondent School District No. 16, there was a brief over the name of *Byron & Long*, with an oral argument by *Mr. George Byron*.

MR. CHIEF JUSTICE WOLVERTON, after stating the facts, delivered the opinion of the court.

The plaintiffs insist that there exists no right of appeal from the acts of a county school superintendent, in changing the boundaries of his district, to the Superintendent of Public Instruction. If this is so, it is decisive of the case, unless the proceedings on review have also brought up for consideration the action of the county school superintendent in making such change. The Superintendent of Public Instruction is empowered "to exercise a general superintendence of the county and district school officers and the public schools of this

state :'' Hill's Ann. Laws, § 2569. And section 2572 provides that "he shall decide, without cost to the parties appealing, all questions and disputes that may arise under the school laws of the state; *provided*, that he may refer any question of importance to the State Board of Education for their decision; and, *provided*, that all decisions, regulations, and forms of procedure, on part of the board, in matters of school controversies, shall be regulated and established by such rules of the board as they may establish. All decisions of the Superintendent of Public Instruction and the State Board of Education shall be binding in law until a different decision shall be given in the circuit and supreme courts of the state." These are the only provisions of the statute to which our attention has been called which would in any way seem to authorize the Superintendent of Public Instruction to entertain jurisdiction, and to hear and determine matters on appeal from the acts of subordinate school officers.

The State Board of Education is authorized and empowered (Hill's Ann. Laws, § 2582, Subd. 2) "to prescribe a series of rules for the general government of the public schools, that shall secure regularity of attendance, prevent truancy, secure and promote the real interests of the schools." In pursuance of such authority, and for the purposes thereby enumerated and prescribed, the board has adopted certain rules, of which numbers 2 and 8 only are pertinent to the present inquiry. Rule 2 relates to appeals by individuals from the action, order, and decision of district boards of directors to the county school superintendent; and rule 8 provides: "An appeal may be taken from the decision of the county superintendent to the Superintendent of Public Instruction, in the same manner as provided for taking appeals from the district board to the county superintendent, as

nearly as applicable, except that he shall give twenty days' notice of the appeal to the county superintendent, and the like notice shall be given to the adverse party. And the decision when made shall, so far as the school department is concerned, be final. This right of appeal shall apply to all cases, except as hereinafter provided, and in any cases of sufficient importance the Superintendent of Public Instruction may bring the matter before the State Board of Education for determination."

The principle is well settled that, where a particular jurisdiction is conferred upon an inferior court or tribunal, its decision will be final, unless provision is made by statute for an appeal: *McGowan v. Duff*, 41 Ill. App. 57; *Hileman v. Beale*, 115 Ill. 355 (5 N. E. 108); *In re Storey*, 120 Ill. 244 (11 N. E. 209). And it has been said by this court that "appeals for the removal of causes from an inferior to a superior court, for the purpose of obtaining trials *de novo*, are unknown to the common law, and can only be prosecuted when they are expressly given by statute:" *Town of La Fayette v. Clark*, 9 Or. 225. To the same effect, also, see *Sellers v. City of Corvallis*, 5 Or. 273; *City of Corvallis v. Stock*, 12 Or. 391 (7 Pac. 524); *Barton v. La Grande*, 17 Or. 577 (22 Pac. 111). Such being the rule pertaining to inferior tribunals invested with judicial cognizance, it applies with equal or greater cogency to officers and boards whose functions are ministerial, or *quasi* judicial only, in their character. It may be conceded that the Superintendent of Public Instruction, in the exercise of a general superintendence of school officers in the several counties, would have the authority to revise their acts in fixing or changing the boundaries of school districts, and that he might exercise such authority as an act of original cognizance: *State v. Whitford*, 54 Wis. 150 (11 N. W. 424); *People v. Board of Education*, 3 Hun. 177. The power to hear and

determine matters on appeal would seem to have been in the contemplation of the legislature from the reading of section 2572, wherein the state superintendent is required to decide questions and disputes arising under the school laws without cost to the parties appealing. But there is here involved the right of parties to appeal to his jurisdiction, and, unless given by statute, it does not exist.

1. The language of the two sections alluded to, as defining or indicating the powers of the Superintendent of Public Instruction, cannot be construed as conferring any such right upon the parties litigant, nor does the statute elsewhere give the remedy. There is no attempt whatever to designate or define the nature or the class of controversies from which an appeal may be taken, nor to indicate what parties to the controversy, if any, are entitled to pursue such remedy. No provisions are thereby made whereby it may be inferred that the legislature even intended to confer any right on the litigants in the nature of a remedy by appeal to a higher functionary for redress, if not satisfied with the action of the officer entertaining original jurisdiction. The remedy by appeal is a matter quite distinct within itself, and, unless given by statute to litigants and parties who may feel themselves aggrieved by the action of a subordinate officer or tribunal, the right simply does not exist, and the action of such functionary is final, except as it may be reviewed by the courts upon appropriate proceedings recognized by law. It is true the board of education has prescribed certain rules defining the manner of taking appeals in certain cases; but, in formulating such rules, it assumed to act only in pursuance of certain statutory powers conferred, and it is very apparent that those powers do not include the authority to give a remedy by appeal from the county school superintendent to the Superintendent of Public Instruction touching matters here in contro-

versy. We are clear that School District No. 16, and its directors, were without the right of appeal to the Superintendent of Public Instruction, and, therefore, that he did not acquire jurisdiction to inquire into the matters of controversy by virtue of the attempted appeal.

2. We are now to consider whether the proceedings and acts of the county school superintendent were properly before the circuit court for review; or, in other words, whether that tribunal obtained jurisdiction to determine the controversy touching them. The statute giving a remedy by writ of review (section 584) has prescribed what the plaintiff shall do in order to obtain the writ. Among other things, he is required to describe in his petition therefor, with convenient certainty, the decision or determination sought to be reviewed, and to set forth therein the errors alleged to have been committed. We must, therefore, look to the petition for the ascertainment of the matters which it is sought to have reviewed, and of the tribunal whose errors it is sought to have corrected. The petition in the case at bar describes very definitely and certainly the decision and determination of the Superintendent of Public Instruction, given and rendered upon the alleged appeal from the county school superintendent, and, in a narrative of the proceedings had and determined, has also specified with some precision the determination of the county school superintendent, but it alleges error only regarding the action of the superior officer. The plaintiffs have thus indicated very clearly that their purpose was to secure a review of the acts and proceedings of the latter officer merely, and, we think, by statutory intendment, the petition became the measure of the court's jurisdiction to hear and determine concerning the matters and proceedings which have been certified up, under and in pursuance of its directions, manifested by the writ. It is true that the county school

superintendent was made defendant, and the prayer of the petition was that he also be required to certify up his record; but no errors were assigned touching his action in the premises, and the only purpose of procuring such record was to enable the court the more readily to determine the errors assigned regarding the action of the Superintendent of Public Instruction, he having considered the matter as one of original cognizance. We hold, therefore, that the circuit court did not acquire jurisdiction by the writ to review the acts and determination of the county school superintendent: *Brody v. Township Board*, 32 Mich. 272. The case of *Woodruff v. Douglas County*, 17 Or. 314 (21 Pac. 49), is cited as an authority for the entertainment of such jurisdiction; but it relates to an appeal from the circuit court, and the assignment of errors in the notice therefor, it being there determined that it was not necessary to the conferring of jurisdiction upon this court that an error relating to the jurisdiction of the court below should be specified in the notice of appeal. In the present case the respondents are seeking to have this court affirm the determination of the lower court in a matter wherein it had never acquired jurisdiction by the petition for the writ to pass upon or decide. The judgment of the court below will therefore be reversed, and the case remanded with directions to reverse and vacate the decision, order, and determination of the Superintendent of Public Instruction in setting aside the order of the county school superintendent.

REVERSED.

Argued 13 February; decided 27 March, 1899.

DAVID v. ANDERSON.

[56 Pac. 523.]

SPECIFIC PERFORMANCE—INDEFINITE CONTRACT.—The consideration for an agreement to convey lands was the payment of a sum of money, and the delivery on demand, "at the mill," of lumber which the vendor intended to use in a house situated not far from the premises in question. The lumber had not yet been manufactured, and the vendee owned a sawmill at a distance, from which it could be transported only at considerable expense to the place where the vendor intended to use it. It was the intention of the parties that the vendee should erect a sawmill on the lands purchased. The testimony as to the mill at which the parties intended the delivery to be made was conflicting. *Held*, that the new sawmill was the one at which the tender of the lumber should have been made.

From Lane: J. C. FULLERTON, Judge.

Suit by Charles R. David against L. F. Anderson to compel a certain agreement to be carried out. Defendant appeals from a decree as prayed.

REVERSED.

For appellant there was a brief and an oral argument by *Mr. A. C. Woodcock*.

For respondent there was a brief and an oral argument by *Messrs. Andrew M. Crawford* and *Wm. R. Willis*.

MR. JUSTICE MOORE delivered the opinion.

This is a suit to enforce the specific performance of a contract of which the following is a copy: "Glenada, Oregon, April 25, 1893. State of Oregon, County of Douglas. This indenture witnesseth that Fred Anderson, party of the first part, of the state and county aforesaid, and Charles R. David, party of the second part, of the County of Lane and state aforesaid, agree to act and abide by the following articles of agreement:

Fred Anderson, his heirs and assigns, agrees that Charles R. David make the following payments, as described below. Then, on receipt of the last payment, Fred Anderson will make a good and sufficient warranty deed to Charles R. David to the following described land, to wit: One acre of land, together with a strip of land sixteen feet wide, running northwest along a creek from said acre of land to the half section line, said acre of land lying on the bank along the northeast side of an old ditch known as 'Anderson's Ditch,' and west of the center of the southeast quarter of section twenty-seven (27), town. nineteen (19) south, range twelve west; outside bounds of said acre of land marked by cedar stakes at each corner. Charles R. David, his heirs and assigns, party of the second part, agrees to pay to Fred Anderson fifty dollars and five hundred feet of cl. flooring, as follows: Ten dollars down, the receipt acknowledged, and ten dollars one month after date, ten dollars two months after date, ten dollars three months, and ten dollars four months after date. Flooring to be paid on demand at the mill. Charles R. David also agrees to build a bridge over flume for Fred Anderson's use, and build a good fence around said acre of land, and to not trespass on Fred Anderson's land without permission. The essence of this contract is the making of the payments. If said payments are not made in full, then this contract becomes void, and whatever payments are made forfeited. L. F. Anderson. [Seal.] Charles R. David. [Seal.] Witnesses: Geo. V. Brainerd, S. B. Calvin."

The parties having surveyed the tract intended to be conveyed, plaintiff fenced it; erected a two-story frame building thereon, which was burned; paid defendant the sum of \$50 within the specified time; manufactured at his mill at Glenada the quantity of clear flooring agreed upon; and notified defendant that the lumber

was ready for delivery, and requested him to take it away, and thereupon demanded of him a deed to the land; but, defendant refusing to execute the conveyance, this suit was instituted. Plaintiff, after alleging the facts hereinbefore stated, further avers: "That at the time of making said agreement it was the intention of the plaintiff to build a sawmill on the acre of land, and to construct a flume upon the strip of land sixteen feet wide, and it was in reference to this expected use of the strip of land that the agreement provided that plaintiff should build a bridge over the flume. Plaintiff shows that there is no flume on the premises, and that, until the flume shall be constructed, the requirement as to the bridge is not in force." The defendant denies the material allegations of the complaint, and avers that, as a part of the consideration for the conveyance of the premises, it was mutually agreed that plaintiff would forthwith erect a sawmill thereon, and that the mill mentioned in the agreement as the place where the lumber was to be delivered was understood by the parties as the mill which was to be erected on said land. The reply having put in issue the allegations of new matter contained in the answer, a trial was had, and, from the evidence taken by the referee, the court found the facts, in substance, as hereinbefore detailed, and thereupon awarded the relief demanded in the complaint, from which defendant appeals.

The only question presented for consideration is, what mill was understood by the parties as the one at which the flooring was to be delivered, plaintiff maintaining that it was the mill which he was operating in Lane County, while defendant insists that it was the one he intended to erect on the land which he agreed to purchase, and each testifies in accordance with the theory for which he contends. The evidence having been taken

by a referee, the lower court did not see the witnesses nor hear them testify, and, therefore, enjoyed no advantages superior to those possessed by this court in determining the weight of the evidence; and, such being the case, presumptions and deductions from the surrounding circumstances must be invoked in aid of the solution of the question.

The evidence tends to show that, when the contract which forms the subject of this suit was consummated, plaintiff owned but one mill, which was located at Glenada, a point about six miles from defendant's residence; that to transport lumber from such mill to defendant's house, where the flooring was to be used, required that it should be hauled to Clear Lake, across which it was necessary to take it on a scow, and by land the remainder of the way; and that such handling of the lumber would greatly augment its original cost. The rule is well settled that a failure of the parties to designate in a contract the place where goods are to be delivered raises the presumption that they are to be delivered where they are deposited or kept at the time the contract was entered into or at the mill where they are manufactured: *Sousely v. Burns' Administrator*, 10 Bush, 87; *Middlesex County v. Osgood*, 4 Gray, 447; *Janney v. Sleeper*, 30 Minn. 473 (16 N. W. 365); *Hamilton v. Calhoun*, 2 Watts, 139. In the case, at bar, however, the contract specified that the flooring was to be delivered "at the mill," and the evidence shows that the lumber was not in existence when the agreement was consummated; and inasmuch as plaintiff, at that time, intended to erect a sawmill on the tract of land which defendant contracted to convey to him, the presumption of the place where it was to be delivered might apply as well to one mill as to the other. But the extra expense which would necessarily be incurred in transporting lumber from Glenada to de-

fendant's home tends strongly to show that the parties understood that the flooring was to be manufactured, and therefore delivered, at the new mill. In view of the irreconcilable conflict in the testimony, and of the necessity of invoking presumptions and deductions to interpret a written contract which should have been specific in its terms, we think plaintiff has not established his right to a specific performance thereof, and that he should, as a condition precedent to such right, have tendered to defendant the flooring at the site of the new mill; and, such being the case, it follows that the decree is reversed, and the suit dismissed.

REVERSED.

Argued 15 February; decided 27 March, 1899.

LORD v. HAMILTON.

[56 Pac. 525.]

LIABILITY OF ATTORNEY.—An attorney is not liable for negligence in not suing a certain person on a certain claim where the client, with full knowledge of the facts, directed him to sue another person on such claim.

From Douglas: H. K. HANNA, Judge.

Action by W. P. Lord and others, State Board of School Land Commissioners, against J. W. Hamilton. There was a judgment for defendant, and plaintiffs appeal.

AFFIRMED.

For appellants there was a brief over the name of *Cicero M. Idleman*, former Attorney-General, with an oral argument by *Mr. D. R. N. Blackburn*, present Attorney-General.

For respondent there was a brief over the name of *J. W. Hamilton*, *in pro. per.*, with an oral argument by *Mr. J. C. Fullerton*.

MR. JUSTICE BEAN delivered the opinion.

This is an action to recover damages for the alleged negligence of defendant in not prosecuting an action against Marks & Co., to recover on an alleged cause of action against them in favor of the plaintiff. The complaint alleges, in substance, that in February, 1884, one Joseph Roberts, at the request and for the benefit of Marks & Co., applied to and obtained from the plaintiff a loan of \$2,000 from the irreducible school fund, giving as security therefor a mortgage upon certain real estate in Douglas County, upon which Marks & Co. held a mortgage for \$28,000, but which, it was understood and agreed, should be cancelled of record before the money should be paid over; that thereafter a member of the firm of Marks & Co. falsely and fraudulently represented to the plaintiff's agent that such mortgage had been cancelled, and, relying upon such statement, took and accepted the note and mortgage from Roberts, and paid over to Marks & Co. the sum of money referred to; that Roberts was at the time, and ever since has been, and is now, insolvent, and wholly unable to pay such loan, or any part thereof; that the mortgage security given therefor was worthless, and of no value, because of said prior mortgage; that in February, 1888, the plaintiff retained and employed the defendant to sue for and collect the \$2,000 loaned upon the note and mortgage of Roberts; that in pursuance of such employment he commenced and prosecuted a foreclosure suit to final decree, but, although having full knowledge of all the facts in reference to such loan, and that it was made for the use and benefit of Marks & Co., and that they had fraudulently received and used the money, he failed and neglected to bring an action against them therefor; that in case he had commenced such action, and prosecuted the same

with due diligence and skill, the plaintiff would have recovered the money so loaned; that by reason of his negligence, delay, and want of skill, the plaintiff's claim against Marks & Co., had become barred by the statute of limitations, and the money wholly lost.

The answer denies the material allegations of the complaint, except as to the defendant's employment to foreclose the Roberts mortgage, and for a further and separate defense, after setting out the foreclosure proceedings and decree as stated in the complaint, alleges that the money was lost to the plaintiff through the negligence and unskillfulness of Judge Willis, who was its attorney at the time the loan was made, and who examined the title of the land offered by Roberts as security therefor, and certified that it was free from all liens and incumbrances, except a mortgage in favor of the plaintiff for \$600; that, relying upon such certificate, plaintiff loaned and paid over the \$2,000 to Roberts, and accepted his note and mortgage therefor; that Willis' certificate was false, in that, at the time it was made and the money paid over, there was a valid, subsisting mortgage of record, upon the land referred to therein, in favor of Balfour, Guthrie & Co., for the sum of \$28,000; that by reason thereof the plaintiff was prevented from realizing any greater amount upon the decree of foreclosure than \$200; that thereafter the plaintiff, believing that Judge Willis was liable to it for such loss, directed the defendant to bring an action against him for negligence, which was subsequently prosecuted to judgment; that by foreclosure of the Roberts mortgage, and the prosecution of such action against Willis, defendant performed all the duties enjoined on him by his employment; and that, when such judgment was rendered against Willis, he was discharged from any further service in such matters. The reply put in issue the material allegations of

the answer, and a trial was had before a jury, which resulted in a nonsuit upon motion of the defendant, made at the close of plaintiff's testimony, based upon the grounds (1) that the evidence failed to show a cause of action in favor of the plaintiff and against Marks & Co.; and (2) that there was no evidence tending to show that the defendant was ever employed or authorized to commence any action against them.

Conceding, for the purposes of this case, that the evidence as given by the plaintiff on the trial in the court below tended to show that it had a cause of action against Marks & Co. for the recovery of the money loaned upon the note and mortgage of Roberts, it is very clear that the defendant was never employed or authorized to bring an action thereon. The evidence shows that in 1887 or 1888 he was appointed the attorney and local agent for the plaintiff in Douglas County; that his duty was to examine the title of lands offered as security for loans, and to certify to the same, and to foreclose such mortgages, and bring suits, actions, or proceedings, as the board might direct; that in 1889, under the directions of the plaintiff, he foreclosed the Roberts mortgage, and had the property sold; that after such foreclosure he informed the plaintiff of all the facts within his knowledge in reference to the matter, including the claim that the loan was made in fact for the benefit of Marks & Co.; and that it was through their false and fraudulent representations the money was paid over. After being so informed by the defendant, the plaintiff notified him that it relied upon the certificate of Judge Willis in making the loan, and instructed him to begin an action against Willis to recover the loss occasioned by his false certificate of title. And the evidence shows conclusively that the defendant never was employed or directed by the plaintiff to institute or bring any suit or action what-

ever against Marks & Co.; but, on the contrary, after he had made the members of the board acquainted with all the facts in his knowledge, in reference to the transaction, he was instructed to bring the action against Willis, and the foreclosure of the Roberts. mortgage, and the bringing of such action, were the only services defendant was employed or authorized to perform for the plaintiff in connection with the transaction referred to in the pleadings. This being so, it is manifest that it has no cause of action against him for failing to bring or prosecute an action against Marks & Co., which he was neither authorized nor empowered to bring. Judgment must be affirmed, and it is so ordered.

AFFIRMED.

Decided 20 March; rehearing denied 22 May, 1899.

WELCH v. OREGON RAILWAY AND NAV. CO.

[56 Pac. 417.]

34	447
40	250

1. WHARVES—TIDE LAND—ESTOPPEL.—An owner of upland bordering on a navigable stream, having a right to build a wharf at deep water in front of his property who transfers his wharf privilege is thereby estopped from objecting to the maintenance of a wharf built on the faith of his conveyance, even though he subsequently acquires from the state the tide land between the upland and the wharf: *McCann v. Oregon Ry. & Nav. Co.*, 13 Or. 455, followed.
2. TIDE LAND—INJUNCTION.—A tide land owner who does not have access therefrom to deep water because of a wharf in front of him cannot restrain the wharf owner from constructing below low water mark an approach to his property, since the tide land owner has no water rights to be affected.

From Clatsop: THOS. A. McBRIDE, Judge.

This suit was brought in 1883 by James W. Welch to enjoin the Oregon Railway and Navigation Company from constructing a wharf in the Columbia River in front of water blocks 132 and 133 in the town of Astoria. The facts, as they appear from the record, are

that John M. Shively, who was the owner of a donation land claim embracing much of the present site of Astoria, and bounded on the north by the Columbia River, laid out and platted a part thereof, and also the adjacent tide lands and a portion of the Columbia River in front thereof, into city blocks, separated from each other by streets, some running at right angles to, and others nearly parallel with, the high-water mark. Blocks 112 and 120, as so laid out, are partly above and partly below the line of ordinary high water. Block 121 is in front of block 112, and east of block 120, and block 133 is in front of block 120; and both of these latter blocks are partly above and partly below the line of ordinary low water. Block 132 is in front of block 121, and east of block 133, and blocks 132 and 133 extend out into the Columbia River below the line of low water. On February 18, 1860, Shively sold and conveyed to James Welch, plaintiff's father, blocks 112, 120, and 133, and on August 12, 1869, sold and conveyed to James Taylor blocks 121 and 132. Prior to 1873, Welch sold and conveyed lots 5 and 6 in block 120 to Ingalls, who sold and conveyed the same to Taylor. On September 5, 1873, as a result of these conveyances, Welch owned the upland in block 112, and Taylor had a deed to, and claimed to own, blocks 121 and 132 in front thereof, and Taylor owned the uplands in lots 5 and 6 in block 120, and Welch had a deed to and claimed to own block 133 in front of the same. While the title was in this condition, the common council of the City of Astoria, upon the application of Welch and Taylor, and by virtue of Section 4228, Hill's Ann. Laws, passed an ordinance on September 5, 1873, authorizing them to extend a wharf, which they proposed to build north of blocks 132 and 133, out into the river to a line of frontage of twenty-

two feet of water at mean low tide, and to extend such wharf up and down the river in front of both of such blocks.

After the passage of this ordinance, and on the seventeenth day of September, 1873, Taylor and Welch sold, assigned, and transferred all their rights, privileges, and franchises thereunder, including "all right and title to build and erect wharves and warehouses under said ordinances," to the Astoria Farmers' Company, on condition that it would comply with the terms of the ordinance; and, on the fifteenth of August, Welch and wife conveyed to such company all block 133, except seventy feet of the south side thereof, together with all easements in front and north of such block to the ship channel, on condition that the Farmers' Company would, prior to the first day of January, 1874, build a wharf as provided for in the ordinance referred to, one-half to be in front of the premises granted. By a deed of the same date, Taylor and wife conveyed to the Farmers' Company all block 132, except seventy feet of the south side thereof, together with all easements in front and north of such block to the ship channel, conditioned in every respect as the deed of Welch and wife referred to. Acting upon these conveyances from Welch and Taylor, and the assignment to it of the rights acquired by them under such ordinance, the Farmers' Company erected a wharf out in the river about three hundred feet distant from the north line of blocks 132 and 133, and connected the same by a roadway with what purports to be a street north of such blocks, designated as "Water Street," no part of such wharf or roadway being upon either tide or upland. This wharf and all the property acquired from Welch and Taylor was prior to 1883 conveyed to the defendant. After the wharf had been constructed, and

on the tenth of August, 1876, the state conveyed to Taylor, the owner of lots 5 and 6 in block 120, all the tide land in front of such lots; and on the fifteenth day of August, 1883, after the wharf heretofore referred to had been burned, Taylor and wife conveyed such tide land to the plaintiff, who immediately instituted this suit for the purpose of enjoining the rebuilding of such wharf and a roadway or approach thereto in front of lots 5 and 6 from the street north of block 133. Upon these facts, the court held that the defendant company had the right, as against the plaintiff, to reconstruct the wharf, but that it had no right to build the approach referred to, and entered a decree accordingly. From this decree both parties appeal.

MODIFIED.

For the plaintiff there was a brief and an oral argument by *Mr. Clifton R. Thomson*.

For defendant there was a brief and an oral argument by *Mr. W. W. Cotton*.

MR. JUSTICE BEAN, after stating the facts, delivered the opinion of the court.

1. It will be observed from the statement of facts that the questions involved in this case are identical with those presented to and determined by the court in the case of *McCann v. Or. Ry. & Nav. Co.*, 13 Or. 455. (11 Pac. 236). That was a suit to enjoin the reconstruction of such wharf in front of lot 2 in block 112, brought by a vendee of Welch and of the state to the tide land in front of such lot, conveyed after Welch and Taylor had sold all their rights under the ordinance, and water blocks 132 and 133 to the Farmers' Company. At the time of the passage of such ordinance, Welch was the owner of

block 112, the upland block, while Taylor claimed to own blocks 121 and 132 in front of it; and, at the same time, Taylor owned lots 5 and 6 in block 120, while Welch claimed to own block 133 in front thereof. In other words, Welch owned the upland in front of which Taylor undertook to transfer to the Farmers' Company a water block, and he and Welch the right to construct a wharf, while Taylor owned the upland in front of which Welch undertook to convey to such company a water block, and he and Taylor a similar wharfage right. In the *McCann Case* the court held that Welch had, at the passage of the ordinance, by virtue of his ownership of block 112, the right under the laws of the state to build a wharf in front thereof; and, having transferred such right to the Farmers' Company, upon its agreement to build it, and the company having complied therewith, and built the wharf at great expense, neither he nor his subsequent grantee could thereafter interfere with it or prevent its reconstruction. After stating his individual views upon the tide land question, and noting the fact that his associates did not agree with him, Mr. Justice THAYER, speaking for the court, says: "But, waiving that view of the question, and conceding that the state is, as some of the authorities have said, the owner in fee of the lands referred to, and can grant them, with the incidental rights of the shore or bank owners, to any private person the state government may please to favor, and still I do not see how the appellant can be entitled to the relief claimed under the provisions of said chapter LXIII of the laws of the state. Welch had been vested with the right to construct the wharf, and had transferred it to the Astoria Farmers' Company before he conveyed lot 2 to the appellant. It was a right which the state had, under the law, already granted, so far as it could be empowered to grant such rights; and it

certainly had no authority to reinvest itself of it, and grant it to the appellant. Its power in that respect had been expended, and the appellant accepted the deed to the so-called tide land in that condition of affairs; and I do not see how it can consistently be claimed that it operated to divest the Farmers' Company of their right in the premises, and invest them in the appellant. * * * No court in any civilized community, it seems to me, would uphold so flagrant an injustice. I think the appellant, when he accepted the deed from Welch to said lot No. 2, took it subject to the acts of the latter affecting the riparian rights pertaining to it; that the deed from Welch to the Astoria Farmers' Company, of August 15, 1873, and the assignment by Welch and Taylor of September 17, 1873, to the said company, of all their rights under the wharf ordinance of the city, which imposed the obligation upon said company to build the wharf, was a relinquishment of any rights Welch may have had to the land upon which it was located arising out of his ownership of said block No. 112, or of any land owned by him at that time which abutted upon said tide water, and estopped him and his grantees thereof from ever objecting to the maintenance of said wharf. Any different conclusion of the matter would, in my judgment, operate as a hardship and fraud, which a court of equity will never sanction. The decree appealed from should therefore be affirmed."

Within the doctrine of that case, Taylor, who was the owner of lots 5 and 6, in block 120, at the time of the passage of the ordinance granting to himself and Welch the right to construct the wharf in front thereof, and at the time of the transfer of the rights acquired by them under such ordinance, and of blocks 132 and 133, to the Farmers' Company, had the right to construct such wharf; and having transferred it to the company before

he acquired the tide land in front of lots 5 and 6, neither he nor his subsequent grantee can now deny or question the right of the Farmers' Company and its successors in interest to reconstruct or maintain such wharf. The plaintiff, realizing the force and effect of the decision in the *McCann Case*, challenges its soundness, and insists that it should be overruled; but it was the unanimous decision of our predecessors, on exactly the same state of facts, and is manifestly equitable and just. We are, therefore, unwilling to disturb it, or even at this time to re-examine the reasons upon which it is grounded.

2. The remaining question is whether the court erred in enjoining the defendant from constructing the roadway or approach to its dock in front of the tide land owned by the plaintiff. As already stated, this roadway is not upon or across any of the tide land, but is wholly below the line of low water. It cannot, therefore, interfere with any of the plaintiff's rights, unless it is an obstruction to a wharfage right; and, as we have already seen, he has no wharfage rights in front of lots 5 and 6. These lots are one hundred feet in width, and the defendant's dock extends for several hundred feet up and down the river on each side of an extension of the side lines of such lots. The plaintiff, therefore, cannot have access to the channel of the river, because of the dock or wharf, and so cannot complain of any use made by the defendant of the bed of the river below the line of ordinary low water, because it cannot interfere with any of his rights. It follows that the decree of the court below should be reversed in so far as it restrains the defendant from constructing the contemplated roadway or approach to its wharf, and in all other respects affirmed.

MODIFIED.

Argued 9 January; decided 27 February, 1890.

SIEVERS v. BROWN.

[45 L. R. A. 642; 56 Pac. 171.]

1. **RIGHT CONFERRED BY BOND FOR DEED.***—A bond for a deed transfers to the obligee an equitable interest in the land agreed to be conveyed, the legal title remaining with the obligor in trust for the purchaser.
2. **BOND FOR DEED—RIGHT OF GRANTEE TO POSSESSION.**—Unless particularly specified, a bond for a deed does not entitle the obligee to possession, and if he takes possession without consent, he is a trespasser.
3. **RENT FOR POSSESSION UNDER A BOND.**—Where the obligee in a bond for a deed takes possession, the payment of interest on deferred installments of the purchase price is usually sufficient compensation for the use of the premises until the maturity of the debt under the bond.
4. **VENDOR AND PURCHASER—EFFECT OF REFUSAL TO PAY.**—A vendee in possession of real property under a contract for its purchase is liable to the vendor for the reasonable rent thereof from the date of his refusal to carry out the contract.
5. **EFFECT OF FORECLOSURE ON TENANT'S RIGHTS.**—The rights of a tenant are not affected by a foreclosure until the delivery of the sheriff's deed after confirmation of the sale.
6. **FORFEITURE UNDER BOND FOR DEED.**—The obligor in a bond for a deed cannot demand compliance with the contract by the obligee, or declare a forfeiture for a breach thereof, until he is himself prepared to comply with its terms, and has tendered a deed.
7. **VENDOR AND PURCHASER—TERMINATION OF TENANCY.**—The tenancy at will initiated between a vendor and vendee of real property by the failure of the latter to carry out the contract of sale is terminated by a tender of compliance therewith by the vendor, coupled with the ability to make good the tender.
8. **VENDOR AND VENDEE—EMBLEMENTS.**—A vendee who is in possession of real property as a tenant at will under a bond for a deed, the terms of which he has broken, is entitled to the crops sown thereon before such tenancy was ended, but not to such as were sown after notice to quit.
9. **WHAT IS NOTICE TO QUIT.**—The commencement of a suit to foreclose a bond for a deed, is equivalent to a notice to the vendee in possession to quit, within the terms of Section 3523, Hill's Ann. Laws, giving a tenant the right to harvest a crop sown before receiving a notice to quit.†

From Marion : **GEORGE H. BURNETT, Judge.**

*NOTE.—As to the interest obtained by a bond for a deed, see the opinion in *Security Savings Co. v. Mackenzie*, 33 Or. at pp. 211 and 214; *Gray v. Perry*, 26 Or. 1, and *Sayre v. Mohney*, 30 Or. 328.—REPORTER.

†NOTE.—This section reads as follows: "When the leasing is for the purpose of farming, the tenant * * * shall have free access to * * * gather any crop planted or sown by him before the service of notice to quit."—REPORTER.

34	454
45	344
34	454
45	80
48	132

This is an action by Henry H. Sievers to recover the value of certain crops grown by him on the land of Samuel B. Brown, but appropriated by the latter to his own use. The transcript shows that plaintiff, having agreed to purchase from defendant a tract of land in Marion County for the sum of \$3,200, paid of the purchase price, on September 8, 1892, the sum of \$600, and executed his promissory note for the balance, payable in eight years, in annual installments of \$325, which note provided that, if default should be made in the payment of any of said installments when they severally matured, defendant might elect to consider and treat the whole sum as then due and payable; that, in consideration of said payment and promise, defendant executed to plaintiff a bond for a deed, whereby he covenanted, upon the payment of said note, to convey the premises, by a good and sufficient deed, free from all incumbrances, and plaintiff, by defendant's license, entered into possession thereof; that, on the maturity of the first installment, defendant demanded payment of the same, but plaintiff, claiming that the land was not correctly described in the bond, and that defendant's title thereto was defective, refused to comply therewith; that defendant instituted a suit in the Circuit Court of Marion County against the heirs of his grantors, and obtained a decree correcting the description, and, having otherwise perfected his title to the premises, he executed and tendered to plaintiff a deed thereof, and demanded payment of said note, but plaintiff refused to pay any part thereof, whereupon defendant commenced a suit in said court against him, and obtained a decree correcting the description contained in the bond, foreclosing plaintiff's equitable interest in the premises, which were ordered sold, and the purchaser put in the immediate possession thereof, in pursuance of which the sheriff of said county

sold the land to defendant, and on July 31, 1894, evicted plaintiff therefrom, and restored the possession to defendant, though the sale was not confirmed until the sixth of November, following; that when said land was sold there was a quantity of wheat and oats growing thereon of the reasonable value of \$92.66, and vegetables of the value of \$75, and a lot of hay cut from said premises stored in the barn, all of which defendant appropriated to his own use. The cause being at issue, a trial was had, and the jury, in pursuance of the court's instructions, found that plaintiff was only entitled to the sum of \$37.50, the value of the hay, and, judgment having been rendered thereon, plaintiff appeals.

AFFIRMED.

For appellant there was a brief over the name of *Mitchell, Tanner & Mitchell*, with an oral argument by *Mr. Albert H. Tanner*.

For respondent there was a brief over the name of *Holmes & Kellogg*, with an oral argument by *Mr. William H. Holmes*.

MR. JUSTICE MOORE, after making the foregoing statement of facts, delivered the opinion.

It is contended that, if the crops be regarded as part of the realty, no title thereto vested in defendant under the foreclosure proceedings until the sheriff's deed was executed; that plaintiff, having planted them, was the owner thereof; and that defendant, having converted them to his own use, is liable for their value.

1. A bond for a deed transfers to the obligee an equitable interest in the premises agreed to be conveyed, which is measured by the amount paid on account of the

purchase. The legal title remains in the obligor, in trust for the purchaser, who, upon payment of the entire consideration, acquires the whole equitable interest, and may maintain a suit to compel the specific performance of the contract, if the obligor refuse to keep his covenants. In *Lysaght v. Edwards*, 2 Ch. Div. 499, JESSEL, M. R., in commenting upon the purport of an agreement to convey real property, and the method of foreclosing the purchaser's equity, says: "It appears to me that the effect of a contract for sale has been settled for more than two centuries. Certainly it was completely settled before the time of Lord Hardwicke, who speaks of the settled doctrine of the court as to it. What is that doctrine? It is that, the moment you have a valid contract for sale, the vendor becomes, in equity, a trustee for the purchaser of the estate sold, and the beneficial ownership passes to the purchaser; the vendor having a right to the purchase money, a charge or lien on the estate for the security of that purchase money, and a right to retain possession of the estate until the purchase money is paid, in the absence of express contract as to the time of delivering possession. In other words, the position of the vendor is something between what has been called a naked or bare trustee, or a mere trustee (that is, a person without beneficial interest), and a mortgagee who is not, in equity (any more than a vendor), the owner of the estate, but is, in certain events, entitled to what the unpaid vendor is, viz., possession of the estate, and a charge upon the estate for his purchase money. Their positions are analogous in another way. The unpaid mortgagee has a right to foreclose; that is to say, he has a right to say to the mortgagor, 'Either pay me within a limited time, or you lose your estate,' and in default of payment he becomes absolute owner of it. So, although there has been a valid contract of sale, the vendor has a similar right in

a court of equity. He has a right to say to the purchaser, 'Either pay me the purchase money, or lose the estate.' Such a decree has sometimes been called a decree for cancellation of the contract. Time is given by a decree of the court of equity, or now by a judgment of the high court of justice; and, if the time expires without the money being paid, the contract is canceled by the decree or judgment of the court, and the vendor becomes again the owner of the estate."

It will be observed, from the language quoted, that in England, if the vendee, under a contract for the purchase of real property, make default in the payment of the purchase money, the vendor may maintain a suit to cancel the contract, which is equivalent to a strict foreclosure. In *Button v. Schroyer*, 5 Wis. 598, it was held that a decree foreclosing a contract for the conveyance of real property, which ordered a sale of the premises, was erroneous, the court saying: "The proper decree in such cases is that the money due upon the contract be paid within such reasonable time as the court may direct, or that the vendee be foreclosed of his equity of redemption." To the same effect is the case of *Baker v. Beach*, 15 Wis. 99. The justice of the rule, announced in England and followed in Wisconsin, may well be doubted, and particularly so when the vendor has received a large portion of the purchase money; in which case equity would seem to demand that the premises be sold to satisfy the balance due on the contract, upon the payment of which the vendee should be entitled to the remainder of the money derived from such sale.* But whatever the proper rule may be, the consideration of the decree in the foreclosure proceedings does not seem to be necessary in the determination of this cause.

* NOTE.—In this connection see *Security Savings Company v. Mackenzie*, 33 Or. at pp. 212-214, and *Gray v. Perry*, 25 Or. at p. 6.—REPORTER.

2. An examination of the transcript shows that the sheriff, obeying the mandate of the court, sold the land to defendant, which sale was thereafter confirmed by the court, and, in the absence of an appeal from said decree, it must be assumed that defendant did not acquire plaintiff's equitable interest in the premises until he procured the sheriff's deed thereto. Such interest not having been barred when plaintiff was evicted, it becomes important to consider the relation that existed between the parties under the contract. A bond for a deed, unless so specified therein, does not entitle the obligee to take possession of the premises, and hence, if he enter without the obligor's license, express or implied, he is a trespasser: *Williams v. Forbes*, 47 Ill. 148; *Chappell v. McKnight*, 108 Ill. 570; *Druse v. Wheeler*, 22 Mich. 438.

3. When possession is given, however, either by the bond or the obligor's license, it is understood, in the absence of any stipulation to the contrary, that the payment of interest on the deferred installments of the purchase price affords an ample consideration for the use and occupation of the premises: *Cleveland v. Burrill*, 25 Barb. 532; *Parke v. Leewright*, 20 Mo. 85; *Hundley v. Lyons*, 5 Munf. 342; *Hepburn v. Dunlop*, 14 U. S. (1 Wheat.) 179.

4. It has been held that a purchaser in possession of real property under the vendor's license cannot be evicted, so long as he offers to perform the conditions of his agreement (*Whittier v. Stege*, 61 Cal. 238); but, if he refuses to comply therewith, the vendor may treat him as a tenant at will (*Harris v. Frink*, 49 N. Y. 24, 10 Am. Rep. 318); and he thereby becomes liable to the vendor for the reasonable value of the use of the premises for the time during which he continues in possession after he abandons the agreement (*Smith v. Wooding*, 20 Ala. 324; *Osgood v. Dewey*, 13 Johns. 240; *Dwight*

v. *Cutler*, 3 Mich. 566, 64 Am. Dec. 105; *Hogsett v. Ellis*, 17 Mich. 351; *Gould v. Thompson*, 4 Metc. [Mass.] 224). The application of this rule would render plaintiff liable to defendant for the reasonable rent of the land from the time the relation of vendor and purchaser was abrogated by the former's refusal to keep his agreement.

5. As a corollary from this plaintiff would undoubtedly be entitled to the crops grown thereon, as emblements, unless the relation of landlord and tenant was terminated, for it has been held that a tenant is not affected by a foreclosure till the sale is consummated and the deed delivered: *Whalin v. White*, 25 N. Y. 462; *Allen v. Elderkin*, 62 Wis. 627 (22 N. W. 842).

6. The relation of vendor and purchaser was undoubtedly severed, and that of landlord and tennant inaugurated, September 8, 1893, when plaintiff refused to pay the first installment due under the contract; but plaintiff's repudiation of his agreement did not authorize defendant to declare a forfeiture until March, 1894, when he was ready and able to convey the premises according to the terms of his bond: *Mix v. Beach*, 46 Ill. 311; *Peck v. Brighton Co.*, 69 Ill. 200.

7. Defendant, in March, 1894, having tendered a deed, and demanded payment of the amount agreed upon, plaintiff's refusal to comply therewith was tantamount to a declaration of forfeiture, which terminated the tenancy existing between the parties.

8. This being so, the decision must hinge upon the question whether the crops were planted before or after that date. In *Samson v. Rose*, 65 N. Y. 411, it is held that one whose estate is terminated by his own act or default is not entitled to emblements. In *Harris v. Frink*, 49 N. Y. 24 (10 Am. Rep. 318), Mr. Justice RAPALLO, in commenting upon the right of a vendee to take the crops grown upon the premises of which he was in possession

under a contract of purchase, says: "If he makes default in his contract of purchase, or commits waste, or in any other manner terminates the tenancy by his own wrongful act, he becomes a trespasser, and may be sued as such, or in ejectment, and he cannot dispute the title of the party under whom he entered (*Cooper v. Stower*, 9 Johns. 331; *Dolittle v. Eddy*, 7 Barb. 74; *Whiteside v. Jackson*, 1 Wend. 418; *Leonard v. Pitney*, 5 Wend. 30; *Jackson v. Stewart*, 6 Johns. 34 (8 Am. Dec. 293); *Quackenboss v. Lansing*, 6 Johns. 49); and he would, no doubt, forfeit his right to emblements under those circumstances." See, also, *Stewart v. Doughty*, 9 Johns. 107; *Whitmarsh v. Cutting*, 10 Johns. 360; *Powers v. Ingraham*, 3 Barb. 576. "It is true," says Mr. Justice FOLGER in *Reeder v. Sayre*, 70 N. Y. 180 (26 Am. Rep. 567), "that a tenant, holding by a tenure which is uncertain as to the time at which it will cease, is entitled to take off, after it has ceased, the crops which he has sowed in the course of husbandry. But if it is certain at the time when he sows how long it will continue, and it is plain that he cannot, before it ceases, reap that which he may sow, then it is his own folly if he sows (per Lord MANSFIELD, *Wigglesworth v. Dallison*, 1 Doug. 201), and he will not be permitted to reap. This rule does not give to the tenant any right by reason of his having ploughed, manured, or otherwise prepared the ground for the seed, if he has not sowed."

9. There is no evidence in the bill of exceptions tending to show when the seed was planted or sowed, and, this being so, it must be presumed, in view of the judgment, that the crops were not put in until after the tenancy was terminated by the commencement of the suit to foreclose the bond, which was equivalent to a notice to quit: Hill's Ann. Laws, § 3523. No error hav-

ing been committed by the introduction in evidence of the judgment roll, or by giving the instructions complained of, it follows that the judgment is affirmed.

AFFIRMED.

Decided 16 January; rehearing denied 13 February, 1899.

VAN WINKLE v. CRABTREE.

[55 Pac. 831; 56 Pac. 74.]

1. **ELECTIONS—CONSTRUCTION OF LAW.**—The provisions of the election act generally known as the Australian Ballot Law relating to the space in which the marking of the ballots shall be done are mandatory, although there is no provision rendering void a ballot not marked in the prescribed manner.
2. **IDEM—SPACE FOR DISTINGUISHING MARK.**—Where an election law requires the elector to indicate his choice by a mark, the ballot should be counted if the mark is made anywhere in the space occupied by the name of the chosen candidate, so long as it does not obliterate such name.
3. **VOTING MARKS ON BALLOTS.**—Where an election law requires the voter to place a mark opposite the name of the candidate voted for, but does not define the character of such mark, a ballot should not be counted for either candidate where it contains a cross at the left of the name of one candidate, and at the left of the name of a rival candidate a single downward slanting stroke of the pencil, from left to right, crossed by a waving or curved line.
4. **IDEM.**—Under such an act, ballots marked opposite the names of all the candidates but one for a certain office, and not having any mark opposite his name, cannot be counted for the latter.
5. **IDEM.**—In view of such an election law, ballots having pencil lines drawn through the names of all the candidates for an office except one cannot be counted for the latter.
6. **IDEM.**—Where an elector has, with one exception, voted for the candidates of one party, and in that one instance has placed a mark on the line dividing the space between two candidates, the center of the mark being slightly inside the space of the candidate of the party for which he has cast his other votes, the ballot is properly counted for the latter; since, considering the tendency of electors to vote a partisan ticket, the elector's intention to vote for his party's candidate can be ascertained therefrom.
7. **IDEM.**—Under the Oregon law, a ballot should not be counted for a candidate at the left of whose name appears a cross, where two pencil lines are drawn through his name indicating that the voter had changed his mind after making the cross.
8. **ELECTION CONTESTS—TESTIMONY OF ILLEGAL VOTERS.**—The testimony of illegal voters as to the person for whom they voted is admissible in an election contest, where they voted in the belief that they had the right to do so; and the ballots cast by such persons may be deducted from those credited to their candidates.

9. **VOTING MARKS ON BALLOTS.**—Ballots bearing any mark in a given space should be counted for the candidate in whose space the mark is made, though parts of such marks extend into other spaces.
10. **IDEM.**—Where an elector, with one exception, voted for the candidates of one party, and the mark opposite that party's candidate for one office extended through the space reserved for his name, both above into the space containing the name of the office, and below into the space reserved for another candidate's name, the ballot is properly counted for the former, the elector's intention to vote for him being ascertainable therefrom.
11. **DISTINGUISHING MARKS—REJECTING BALLOT.**—A ballot on which an elector wrote in the space appropriated to candidates the name of a person for whom he desired to vote (such person not being a listed candidate) should not be rejected as bearing a distinguishing mark, under section 67 of the election law providing a punishment for voters who thus mutilate their ballots, notwithstanding it is possible that the name so written might afford a means of identifying the voter.
12. **PRESUMPTION FROM BALLOT.**—There is no presumption that a person was not a resident of the precinct where he voted because he did not vote for precinct officers, though his ballot was endorsed "State, county, and dist't."
13. **DISTINGUISHING MARK RENDERING BALLOT VOID.***—Under Laws, 1891, p. 8, § 67, as amended by Laws, 1895, p. 68 (Hill's Ann. Laws, p. 1160), prescribing a punishment for electors who place a distinguishing mark on their ballots so that the same may be identified, a ballot having the mark "O K" written on a blank space, beneath a set of candidates, is void.
14. **IDEM.**—Ballots having the words "voted for" written thereon after the name of one of the candidates, in addition to the required voting mark, carry a "distinguishing mark," which renders them void under the election law.
15. **ELECTION CONTESTS—QUESTIONS REVIEWED ON APPEAL.**—An appeal to the supreme court from a judgment upon the trial of an election contest does not bring up the cause for trial *de novo*, but the questions presented for review are the conclusions of law from the findings of fact.
16. **VOTING MARKS ON BALLOTS.**—Under an election law which provides for indicating the voter's choice by a mark in the space where the candidate's name is printed, or by writing the name of the chosen person if it does not appear on the printed sheet, a ballot having the names of all the candidates for a certain office marked out, and then one of such names written in a blank space left for extra names, cannot be counted at all; nor can a ballot having a line drawn through the name of each candidate of one party.

*NOTE.—See an exhaustive note on Distinguishing Marks which Invalidate Ballots under the Australian System with *Taylor v. Bleakley*, 49 Am. St. Rep., p. 240, 8 C. 28 L. R. A. 683. The following cases consider to some extent the same question: *Miller v. Pennoyer*, 23 Or. 361, and note; *Whittam v. Zahorik*, 51 Am. St. Rep. 317, 329; *Lankford v. Gebhart*, 51 Am. St. Rep. 585, 587; *Dennis v. Caughlin*, 58 Am. St. Rep. 701 (29 L. R. A. 731); *Tebbe v. Smith*, 29 L. R. A. 673 (49 Am. St. Rep. 683); *Buckner v. Lynip*, 30 L. R. A. 354; *Parker v. Orr*, 30 L. R. A. 22; *Sego v. Stoddard*, 22 L. R. A. 468.

Stickers or Pastors were Allowed in the following cases: *Dewalt v. Bartley*, 15 L. R. A. 771 (28 Am. St. Rep. 844); *People ex rel. v. Shaw*, (under a statute) 16 L. R. A. 606; but were Disallowed in these cases: *State ex rel. v. Walsh*, 17 L. R. A. 364; *Re Contested Election of Little Beaver Township*, 27 L. R. A. 234; *Fletcher v. Wall*, 40 L. R. A. 617.—REPORTER.

ELECTION CONTEST—REVIEW—HARMLESS ERROR.—A judgment in an election contest will not be reversed because the court erroneously counted a void ballot for respondent, where it also counted void ballots for appellant, so that in spite of its error, the judgment is correct; and this even where respondent did not appeal, since it is the duty of the appellate court to declare the law applicable to the facts, and correct any error apparent on the record, whether it is complained of or not.

From Linn: HENRY H. HEWITT, Judge.

This is a special proceeding, under Section 2544, Hill's Ann. Laws, to contest the defendant's right to the office of Clerk of Linn County, to which he was declared elected by the county canvassing board. On the official ballot used in said county at the last general election the names of the candidates for the office of county clerk were arranged in the following order:

For County Clerk.	Vote for One.
70. Frank Crabtree of Linn County.....	People's-Democratic-Silver-Republican
71. E. E. Lange of Linn County.....	Regular People's
72. J. M. Marks of Linn County.....	Prohibition
73. J. S. Van Winkle of Linn County.....	Republican

The plaintiff alleges that in certain designated precincts of said county the judges and clerks of election therein returned as cast for him a certain number of votes, but that he received in each of said precincts a greater number than were so counted for him, and prays that said ballots may be recounted, and that he be declared elected to said office. The defendant denies the material averments contained in plaintiff's notice of contest, and alleges, in substance, that there were counted as cast for him in said precincts but one thousand nine hundred and twenty-one votes for said office, when in fact there were polled for him a greater number than were so counted; that plaintiff was credited with having received one thousand nine hundred and twenty votes; and that such number was in excess of the legal

votes actually cast for him. It is also alleged, *inter alia*, that Harry Boyle and Fred Gross voted illegally at said election, and that said votes were counted for plaintiff. The reply having put in issue the allegations of new matter contained in the answer, a recount was ordered; but the court refused to receive in evidence or to count twenty-five ballots which plaintiff claims were cast for him, and received in evidence and counted for defendant eleven ballots to which plaintiff claims he was not entitled. Copies of the ballots so rejected, numbered consecutively from 1 to 25, inclusive, and of those counted for defendant, numbered from 26 to 36, inclusive, are set out in the bill of exceptions; and the original ballots, except No. 4, are also sent up with the transcript for inspection. Ballot No. 1 is marked with an X immediately to the left of Van Winkle's name, and also with a slanting stroke, made by a downward movement of the pencil, from left to right, between the number "70" and the name of "Frank Crabtree," which stroke appears to have been somewhat obliterated by a waving pencil line drawn over the same from the top to the bottom. Twelve ballots, numbered, respectively, 2, 5, 6, 7, 13, 14, 15, 17, 18, 19, 22, and 25, are marked with an X between the numbers "70," "71," and "72" and the corresponding candidates' names, thereby leaving no mark whatever between the number "73" and the name of "J. S. Van Winkle." Ballot No. 3 is marked in the same manner as the twelve ballots just described, except that between the number "73" and the name of "J. S. Van Winkle" the surface of the paper appears to have been abraded, as though the elector made in the space indicated a mark, which he erased with a knife or other sharp instrument. Ballot No. 8 is marked in the same manner as said twelve ballots, and, in addition thereto,

contains curving lines placed after the word "county," appended to the names of Crabtree, Lange, and Marks. Ballot No. 20 contains an X placed to the right of each of the candidates' names, except plaintiff's.

Ballots numbered 9, 21, and 24 are marked by pencil lines through all the candidates' names, county of residence, and political designation, except that of plaintiff. Ballot No. 16 contains a pencil mark drawn through all the candidates' names and their county residence, except plaintiff's, leaving their several party designations unmarked. Ballot No. 23 contains a pencil mark drawn through Crabtree's Christian name, and through the initials of Lange and Marks, leaving plaintiff's name unmarked. Ballot No. 4 has lines drawn through each of the party designations, except the word "Republican." Ballot No. 10 is marked in the same manner as ballot No. 1, except that the stroke thereon is made with a downward movement from right to left, and has no waving lines drawn over it. Ballot No. 11 is marked with an "X," the center of which appears to be a shade above the line between the names of Marks and Van Winkle; and ballot No. 12 has an "X" immediately to the left of, and also two pencil lines drawn through, Van Winkle's name. Ballot No. 26 has a horizontal line drawn through "70," the space to the right thereof, and most of the letters in the word "Frank." No. 27 has a horizontal line drawn immediately below the word "Frank." No. 28 has an "X" to the left of Crabtree's name, and also a horizontal pencil line about one-sixteenth of an inch in length immediately to the left of Lange's name. No. 29 contains an "X," the center of which appears to be a shade above the line between the names of Crabtree and Lange. No. 30 is marked by a nearly perpendicular line, extending through spaces Nos. 70 and 71, which is bisected by a nearly horizontal

line, extending from Crabtree's name. No. 31 has an "X" after the word "county," in space No. 70. No. 32 is like No. 31, with the addition of a similar mark to the left of Crabtree's name. No. 33 contains a mark which fills space No. 70, and a part of space No. 71, with the "X" apparently crossing on the line between the names of Crabtree and Lange. No. 34 is properly marked as indicating the elector's intention to vote for Crabtree; and it also contains the name "G. Bradley," written after the printed name of "W. W. Sanders," candidate for constable. No. 35 is properly marked as having been cast for Crabtree, and also contains the letters "O. K." written with a pencil in the space reserved for a candidate for the office of Attorney-General; and No. 36 is properly marked as having been cast for Crabtree, but on the back of the ballot there is indorsed the words, "State, county & Dis't."

Testimony having been admitted to show that H. R. Boyle (described in the answer as Harry Boyle) was not a citizen of the United States, or of the State of Oregon, and that J. F. Gross (mentioned in the answer as Fred. Gross) was not a resident of Crawfordsville Precinct, Linn County, Oregon, on the day of election, the court, over plaintiff's objection and exception, permitted said Boyle and Gross to testify that at said election each voted for Van Winkle for the office of county clerk. The court, deducting the votes so cast by Boyle and Gross from the number apparently cast for Van Winkle, found that he had received one thousand nine hundred and twelve, and the defendant one thousand nine hundred and thirteen, legal votes for the office of clerk of said county; whereupon the action was dismissed, and plaintiff appeals.

AFFIRMED.

For appellant there was a brief over the names of *Henry H. Hewitt, A. M. Cannon, Percy R. Kelly, J. N. Duncan, and N. M. Newport*, with an oral argument by *Messrs. Hewitt, Kelly, and Newport*.

For respondent there was a brief over the names of *James K. Weatherford, H. C. Watson, W. R. Bilyeu, and J. J. Whitney*, with an oral argument by *Messrs. Watson and Bilyeu*.

MR. JUSTICE MOORE, after making the foregoing statement of the facts, delivered the opinion of the court.

It is contended by plaintiff's counsel that, by giving to the statute providing for the marking and counting of ballots cast at a general election the liberal construction to which it is entitled, an inspection of the twenty-five ballots which were rejected shows that the several electors who cast them intended thereby to vote for Van Winkle, and hence the court erred in refusing to count them for him.

A general statement of the provisions of the Australian Ballot Law, so far as applicable to the facts involved, is deemed essential to a clear understanding of the questions presented for consideration. An act of the legislative assembly approved February 13, 1891 (Laws, 1891, p. 8), appears in Hill's Ann. Laws, at p. 1169 *et seq.*, and provides that the white official ballot shall have printed thereon in bold-faced type the words, "Mark between the number and name of each candidate or answer voted for." The ballots shall be printed so as to give each elector a clear opportunity to designate his choice of candidates by making a mark to the left of the name of the candidate he wishes to vote for: Section 49, as amended by the act approved February 23, 1895 (Laws,

1895, p. 68). The elector shall prepare his ballot by marking immediately to the left of the name of the candidate of his choice for each office to be filled, or by writing in the name of the person he wishes to vote for, which shall be done with an indelible "copying" pencil, or with pen and ink : Section 59, as amended by the act of February 23, 1895. If an elector, by accident or mistake, spoils his ballot, so he cannot conveniently vote the same, he may, on returning said spoiled ballot, receive another in place thereof : Section 62. The county clerk is required to provide for each election precinct in his county two ballot boxes, one of which shall be marked "General," and the other "State and District," respectively : Section 59. If a majority of the judges of election are satisfied the elector is legally qualified to vote in that precinct only for "State" officers, the chairman shall immediately write with pen and ink upon the back of the ballot the word "State," and sign his (the chairman's) initials thereto. If the elector is qualified to vote for district officers also, the chairman shall write as aforesaid the words "State and District." In either such case the ballot shall then be deposited in the box marked "State and District : " Section 61. In the canvass of votes, any ballot from which it is impossible to determine the elector's choice for any of the officers shall be void, and shall not be counted : Section 27. Any ballot from which it is possible to determine the elector's choice for a part of the officers shall be counted for such part. The judges shall disregard misspelling or abbreviation of the names of candidates for office, if it can be ascertained from such ballot for whom it was intended : Section 29. Any elector who shall place any distinguishing mark upon his ballot, whereby the same may be identified, upon conviction shall be punished by a fine of not less than \$50 nor more than \$200 : Section 67.

1. If the provisions of the statute relative to marking ballots are mandatory, no error was committed in rejecting the twenty-five ballots complained of; but plaintiff's counsel argue that it can be ascertained from an inspection of the ballots for whom the elector intended to vote, and that the provision in relation to the counting of the votes cast renders the method of marking the ballots directory only, and hence they should have been counted for plaintiff. Under the provisions of section 49 of the act prior to its amendment, the elector was required to express his preference for the candidates whose names were printed on the official ballot by canceling or marking out the names of those who were not his choice; and it is claimed that the original method induced the electors to express their choice for plaintiff by marking out, or by placing a cross or other mark to the right or left of, the names of all other candidates for that office, and that the original mode of marking ballots, under the very liberal rule prescribed in section 29, should be controlling in determining the elector's choice as evidenced by the marks upon most of the ballots rejected. Every elector who performs the act of voting is presumed to know the law of his state applicable to the exercise of the right of suffrage; and, if he fails to comply with its provisions, his mistake or ignorance deprives him of the benefit to be derived from the practice of such right. This being so, his right to have his choice declared as he intended must depend upon his compliance with the law applicable thereto in force on the day of the election. While the Australian ballot system is designed to purify elections by securing to the voter the prerogative of freely and privately selecting the candidates of his own choice, the law is also well calculated to promote the cause of general education, by compelling the masses to learn to read and write as a

condition precedent to the exercise of the right of suffrage, and to punish the illiterate by compelling them to admit their ignorance in public by asking aid in the preparation of their ballots. To give effect to this latter purpose of the law, which is almost as important as its primary object, the statute should receive a reasonably strict construction.

While there is a conflict of judicial utterance upon the question as to whether, in the absence of a statute rendering a ballot void which is not marked in the prescribed manner, we believe the better reason supports the rule that the provisions of the act, so far as they relate to the space in which the marking should be done, should be construed as mandatory: *McCrary, Elec.* (4 ed.), § 720; *Attorney-General v. McQuade*, 94 Mich. 439 (53 N. W. 944); *Attorney-General v. May*, 99 Mich. 538 (58 N. W. 483); *Whittam v. Zahorik*, 91 Iowa, 23 (57 Am. St. Rep. 317, 59 N. W. 57); *Parvin v. Wimberg*, 130 Ind. 561 (30 Am. St. Rep. 254, 15 L. R. A. 771, 30 N. E. 790); *Bechtel v. Albin*, 134 Ind. 193 (33 N. E. 967); *Sego v. Stoddard*, 136 Ired. 297 (22 L. R. A. 468, 36 N. E. 204); *Curran v. Clayton*, 86 Me. 42 (29 Atl. 930); *People v. Board of Canvassers of Onondaga Co.*, 129 N. Y. 395 (14 L. R. A. 624, 29 N. E. 327). In *Bechtel v. Albin*, 134 Ind. 193 (33 N. E. 967), Mr. Justice HACKNEY, in construing a similar statute of Indiana, says: "That the legislature intended a strict observance of the rule so provided is further shown in the provision that if, in an attempted compliance, the voter, by accident or mistake, spoils, defaces, or mutilates his ballot, he can have another."

2. True, the statute reads: "Any ballot from which it is possible to determine the elector's choice for a part of the officers shall be counted for such part, but the remainder of the ballot from which it is impossible to

determine the elector's choice shall be void as to such defective part, and such defective part shall not be counted." Section 29. This clause, however, must be construed in the light of the provisions relating to marking the ballot for the particular candidate of the elector's choice. The voter, under the present act, manifests his selection by a mark, and not by the absence of one; hence it would seem that, notwithstanding the law prescribed that the mark should be made immediately to the left of the name of the candidate voted for, the vote should be counted if the mark was made anywhere in the space occupied by the name of the candidate of the elector's choice, so long as it did not obliterate such name. If a voter were to write on his ballot, "I hereby vote for each republican candidate on this official ballot," no intelligent person could possibly mistake his intention as thus expressed; but it is not to be supposed, under the very liberal provisions of section 29, that such a ballot would be counted for any candidate of that party, because the Australian Ballot Law requires of the voter a comparison of the integrity, morality, and fitness of the various candidates of each party for the offices to be filled, and a conclusion thereon that the particular candidates whom the elector selects fill the measure of these several necessary requirements. In view of these rules, we will examine the ballots which were rejected by the court.

3. It will be remembered that ballot No. 1 contains to the left of Crabtree's name a single downward slanting stroke of the pencil, made from left to right, over which a waving or curved line is made with the pencil, and also contains an "X" to the left of Van Winkle's name. The statute has not prescribed the character of the mark which an elector should make as indicative of his choice of candidates; and, this being so, the ballot in question

is as well marked for Crabtree as for Van Winkle; and hence no error was committed in rejecting it. Ballot No. 10 has a slanting pencil line, made with a downward stroke, from right to left, which is placed to the left of Marks' name, and also has an "X" placed to the left of Van Winkle's name; and, being like ballot No. 1 in respect to the mode of marking, it was properly rejected.

4. Ballots numbered, respectively, 2, 8, 5, 6, 7, 8, 13, 14, 15, 17, 18, 19, 20, 22, and 25, contain no marks whatever in the space occupied by Van Winkle's name, and hence no error was committed in rejecting them.

5. Ballots numbered 4, 9, 16, 21, 23, and 24, having pencil lines drawn through the names of all the other candidates except Van Winkle's, were not admissible in evidence as tending to prove plaintiff's right to the office; and no error was committed in refusing to count them.

6. In ballot No. 11 the point at which the lines of the "X" cross each other appears to be situated above the printed line which separates the names of Marks and Van Winkle. The mark on this ballot plainly illustrates the rule, as the writer understands it, for determining the elector's choice, as prescribed in section 29, when any doubt exists in that respect. It shows that the person who cast it voted for every Prohibition candidate but one whose name appeared upon the official ballot. Experience demonstrates that the average voter is more of a partisan than a patriot; or rather, perhaps, his bias unconsciously leads him to conclude that true patriotism at the polls is evidenced by an expression of his choice for each of the candidates nominated by the party of which he is a member, and that the persons so named by his party are, to his mind, superior in intelligence, in probity, and in business capacity, to any other candidates nominated by opposing parties for the offices to be filled

at the election. Those officers who are called upon to determine the result of the election from an inspection of the ballots cast thereat, must necessarily consider this peculiar trait of human character, whenever any doubt exists in relation to the expression of the elector's choice of candidates for office. . Invoking this rule, and considering that the center of the "X" is situated above the printed line separating the names of Marks and Van Winkle, we think it is possible to determine from an inspection of the ballot that the elector who cast it chose Marks, the Prohibition candidate, for the office of county clerk; and, this being so, no error was committed in refusing to count ballot No. 11 for plaintiff.

7. It would appear from an inspection of ballot No. 12 that the elector who cast it had voted for Van Winkle by making an "X" immediately to the left of his name, but, for some unexplained reason, changed his mind; and, to make his intention perfectly plain to the judges of election, he drew two pencil lines through Van Winkle's name. No error, in our judgment, was committed by the court in rejecting ballot No. 12.

8. It is contended by plaintiff's counsel that the court erred in permitting H. R. Boyle and J. F. Gross to testify that they voted for Van Winkle for the office of county clerk, and in deducting from the number of votes which he received the two so claimed to have been cast by them. The primary object of the Australian Ballot Law is to protect the elector from intimidation, to accomplish which the secrecy of the ballot must be preserved; and, therefore, if he be a qualified voter, he cannot be compelled to testify for whom he voted at any election. It is generally held, however, that this rule cannot be invoked to shield a person who is not a legal voter. The wisdom of such a conclusion might not at first seem apparent, for it may be assumed that, if a person voted

at an election when he knew he was not entitled to exercise the right of suffrage, he must have been prompted to do so from some unworthy motive; and, if he would intentionally violate the law in the first instance, it might reasonably be inferred that he could be induced, when the result of the election was very close, to testify that he had voted for a candidate whom he desired to see defeated, when, in fact, he had voted for the candidate's opponent; and thus, instead of correcting the wrong, he would be permitted to relieve the candidate of his original choice from a hostile vote. Such would probably be the result if the person so voting knowingly intended to violate the law; but every man is presumed to be innocent until he is proven to be guilty, and, indulging this presumption, Boyle, though not a citizen of the United States, nor having made any declaration of his intention to become such, may have believed that his father was naturalized before he attained his majority, and, upon becoming of age, he thereby became a legal voter. So, too, it may have been that Gross, being ignorant of the election law, voted for county officers in Crawfordsville Precinct, of which he was not a resident, honestly thinking he had a legal right to do so. If Boyle and Gross entertained the belief that might be attributed to them, their ballots, though illegal, were not superinduced by moral turpitude; and under such circumstances it is reasonable to suppose that they would testify truthfully concerning their choice for county clerk, and hence they ought to be permitted to correct the error which they inadvertently committed. That the majority of men are honest must be conceded; and, such being the case, the greatest good may be expected to result from permitting persons who have voted illegally to testify concerning the candidates for whom they cast their ballots, notwithstanding that in

some instances the opposite result may follow. "There can be no doubt," says Mr. Justice STRAHAN, in *State ex rel. v. Kraft*, 18 Or. 550 (23 Pac. 663), "that one important object of the system of voting by ballot is secrecy, so that the voter may freely exercise his choice, uninfluenced by power, station, or the conditions by which he is surrounded; but this protection extends to the lawful voter only, and not to the spurious. It is the lawful voter around whom the law throws its protection, and not to him who assumes to exercise the sacred prerogative of a voter without being duly qualified." In support of the rule here announced, see *McCrary, Elect.* (4 ed.), § 490 *et seq.*; *People v. Pease*, 84 Am. Dec. 242, and notes at p. 269. The illegality of the ballots cast by Boyle and Gross having been established, the court committed no error in requiring them to testify concerning the persons for whom they attempted to vote, or in deducting from the votes cast for Van Winkle the ballots so given him by these witnesses.

9. We now come to the consideration of the ballots that were counted by the court as having been cast for the defendant. From what has already been said, it is apparent that ballots numbered 26, 27, 29, 30, 31, 32, and 33 were properly counted as having been polled for Crabtree.

10. Ballot No. 28 is marked immediately to the left of Crabtree's name with a heavy line, made by a downward stroke of the pencil, from right to left, and extending from a point above the printed line beneath the words "For County Clerk," to a point below the printed line beneath Crabtree's name. This heavy line is bisected near the middle of space 70 by a light line, made by a downward stroke of the pencil, from left to right, extending from about the same point above to about the middle of space 71. Joined to the left of this light line

is a heavier line, made by a downward stroke of the pencil, from left to right, commencing at about the same point above the printed line, beneath the words "For County Clerk," and terminating at a point where the heavy and light lines hereinbefore described intersect each other. Beneath this juncture, and joined to the light line, appear two other heavier lines, made to the right by a slightly downward or nearly horizontal stroke of the pencil, from left to right, the first being in space 70, and the second in space 71, extending from the lower point of the light line about one-sixteenth of an inch to a point in the first initial preceding Lange's name. This ballot, with but one exception, not considering the office of clerk, was cast for the People's-Democratic-Silver Republican candidates, which fact, being considered in connection with the fact that the several lines are so united as to constitute but one mark, leads us to conclude that it is possible to determine that defendant was the elector's choice for the office of county clerk, and that no error was committed by the trial court in counting this vote for Crabtree.

11. In ballot No. 34 the elector wrote "G. Bradley" in the space appropriated to the candidates for the office of constable, between and just a little below the printed name "W. W. Sanders" and the word "Democratic." It is insisted by plaintiff's counsel that the name so written on this ballot constitutes a distinguishing mark, and, this being so, the court erred in counting it as a vote for any purpose. Section 49 of the election law, so far as it relates to the arrangement of the ballot, reads: "There shall be left at the end of the list of candidates for each different office blank spaces in which the elector may write the name of any person not printed on the ballot, for whom he desires to vote as candidate for such office." Section 59 provides that the elector, upon receiving a

white ballot, shall forthwith retire to one of the compartments provided for that purpose, and there prepare his ballot, by marking the same, etc., "or by writing in the name of the person he wishes to vote for." It is evident that the elector, intending to avail himself of these provisions of the law, attempted to write the name of his choice for constable in the proper place, but, by mistake, inserted it in the space reserved for that of W. W. Sanders. It is possible that the name so written might afford the means of identifying the person who cast the ballot; but, since the elector had the right to express his preference by writing on the ballot the name of the candidate of his choice for the office of constable, we cannot think that his vote should be rendered void because it was written three-sixteenths of an inch above the line set apart for that purpose; and hence the court committed no error in admitting said ballot in evidence, or in counting the vote for defendant.

12. Ballot No. 36 has the following words indorsed thereon: "State, county & Dis't." It is maintained by plaintiff's counsel that, inasmuch as the person who cast this ballot did not vote for any candidates for the office of justice of the peace or constable, the indorsement in question shows that the elector was not a resident of the precinct in which he voted, and hence he had no right to vote for county officers, but having done so, the court erred in permitting the ballot to be offered in evidence, and in counting it as a vote for defendant. If it be admitted that the elector who cast this ballot was not a resident of the precinct in which he voted, he had no right to vote for county officers, for the organic law on that subject declares: "All qualified electors shall vote in the election precinct in the county where they may reside for county officers, and in any county in the state for state officers, or in any county of a congressional

district in which such electors may reside for members of congress:" Const. Or. Art. 2, § 17. The ballot of any elector who is entitled to vote for state, county, and district officers should be placed by the judges of election in the box marked "General" (Election Law, § 60); but, inasmuch as the bill of exceptions does not show that the ballot in question was placed in the ballot box marked "State and District," the elector ought not to lose his right to vote for county officers because of such indorsement; and hence no error was committed in receiving said ballot in evidence, or in counting it as a vote cast for defendant.

13. In ballot No. 35, in a blank space immediately below the names of the candidates for "Attorney General," appear the letters "O K," written with an indelible pencil; and it is contended by plaintiff's counsel that these letters constitute a distinguishing mark, by which the ballot might be identified, thereby rendering it inadmissible in evidence, and, this being so, the court erred in counting the vote for defendant. Section 67 of the election law prescribes a punishment for the elector who "places a distinguishing mark upon his ballot whereby the same may be identified;" but the law nowhere, in positive terms, provides that a ballot so marked shall be rendered void. If it should be held, however, that a ballot which had been marked by the elector in such a manner as to render its identification certain was not void, because the statute had not, in positive terms, so prescribed, the effect would necessarily be the destruction of the secrecy of the ballot which the Australian system was designed to promote; for, by the use of a few letters of the alphabet or other characters, such a permutation could be arranged by those who would corrupt the purity of the ballot as would accommodate many thousand voters, thereby identifying the person

who cast each ballot so marked, and evidencing the performance of an illegal agreement to thwart the purposes of the law.

14. The punishment of the voter would be wholly inadequate to correct the evil which such a method of marking the ballots would necessarily entail; for, if one honest vote were polled in each precinct, it would be extremely difficult to prove in an action that the person charged with illegally marking his ballot was guilty thereof; but, if it be held that the ballot so marked is void, the elector who cast it is punished to some extent by being disfranchised at the election when the illegal ballot was deposited, thereby promoting the secrecy which the law enjoins, and preventing the commission of the offense which public policy condemns. In our judgment, the interest of the state demands that a ballot which has been marked in such a manner as to be identified should be declared void, and that our statute impliedly commands that such an effect should follow an illegal marking of a ballot. In *State ex rel. v. Ellis*, 111 N. C. 124 (17 L. R. A. 382, 15 S. E. 938), it is held that the inscription "O K" upon the back of ballots is a device which renders them void under an act of the Legislative Assembly of North Carolina, which prescribes that ballots shall be "without device." It is quite evident that the ballot in question can be identified by the distinguishing letters; and, it seeming to be conceded that the elector placed the marks on his ballot, it follows that the court erred in admitting it in evidence, and in counting it as a vote given for defendant.

15. Considering only the errors assigned in the notice of appeal, and refusing to count ballot No. 35 for defendant, the consequence is a determination that each party received an equal number of votes; but whether this result affirms the judgment because plaintiff should

show a superior right to the office, is not necessary to a decision of the case, for, in an appeal from a judgment given by the court upon the trial of an election contest, the cause is not tried here *de novo*, but the question presented for review must necessarily be, are the conclusions of law deducible from the findings of fact? The respondent, being satisfied with the judgment appealed from, has not assigned any errors, in the absence of which he cannot be heard to complain; but, in modifying the court's conclusions of law so as to work a reversal of or seriously to affect the judgment, the speedy settlement of the issue involved, which seems to be necessitated by the statute (Hill's Ann. Laws, § 2547), demands an examination of the conclusions of law which are not complained of, if to do so would result in an affirmance of the judgment, which must be presumed to be correct. With these introductory remarks, we will examine the findings of fact relative to certain ballots which the court, as a conclusion of law, counted as having been given to plaintiff.

16. On a ballot described in finding of fact number six, the words "voted for" were written with an indelible pencil after the words "J. S. Van Winkle of Linn County;" and a mark was also made immediately to the left of said name. Finding of fact number seven describes a ballot which is marked in the same manner, except that it contains no mark to the left of Van Winkle's name. Finding of fact number eight is as follows: "On a ballot of those cast in West Albany Precinct at said election, a line was drawn, in indelible pencil, through the name 'E. E. Lange of Linn County, Regular People's,' and another line immediately beneath the words 'J. J. Marks of Linn County, Prohibition,' and in the space between the words 'J. S. Van Winkle of Linn County'

and the word 'Republican' appeared written, in indelible pencil, the word 'voted;' there being no other marks or designations on said ballot for the office of county clerk." These three ballots contain a distinguishing mark by which they might be identified, and, such being the case, they ought not to have been counted for plaintiff. Finding number nine is to the effect that on a ballot cast in West Albany Precinct a pencil line was drawn through the name of each candidate for the office of county clerk, but, in the space below said names, the name of "J. S. Van Winkle" was written. Finding of fact number thirteen is as follows: "On a ballot of those cast at said election in North Brownsville Precinct, there appeared a line, made by indelible pencil, drawn through the name of each Republican candidate on said ticket and the name of the county printed therewith, including the words 'J. S. Van Winkle of Linn County;' there being no other mark of any kind on said ballot for the office of county clerk." The ballots described in findings of fact numbered nine and thirteen are not marked in the manner prescribed by law, and, such being the case, they ought not to have been counted for plaintiff.

These conclusions do not change the result reached by the trial court, in view of which the judgment is affirmed.

AFFIRMED.

ON MOTION FOR REHEARING.

MR. JUSTICE BEAN delivered the opinion.

This cause was tried without the intervention of a jury. A recount was made of all the ballots cast for the office in question, and the court, having made findings of fact upon all the disputed ballots, decided that the defendant was elected by one vote, and entered judg-

ment accordingly. The plaintiff and contestant appealed, assigning as error sundry rulings and conclusions of the court against him. Upon the hearing of the appeal it was determined that none of such assignments were well taken, except the one based upon the action of the court in counting for the defendant the ballot described in finding number 26, and marked with the letters "O K." This conclusion would necessarily leave the vote a tie, were it not for the fact that it affirmatively appears from the findings of the court and its conclusions of law that it also illegally counted at least two ballots for the contestant. Among the unquestioned findings are numbers 6 and 7, to the effect that certain ballots, with the words "voted for" written with an indelible pencil on the face thereof, were counted for the plaintiff and contestant, and, within the rule which renders the "O K" ballot void, should not have been counted; so that, notwithstanding the court erroneously counted the "O K" ballot for the defendant, he still received a greater number of legal votes than the plaintiff. It is true, the defendant did not appeal; but he had no occasion or right to do so, because the judgment was in his favor. But, nevertheless, we cannot reverse the judgment upon this record, which shows upon its face that certain ballots were improperly counted for the plaintiff, and that by excluding them the judgment is correct, although it may have been based upon a wrong reason. The condition is that there were three ballots cast, each of which had upon the face thereof such a distinguishing mark as to render it void under the statute; but they were all counted by the court below,—two for the plaintiff, and one for the defendant. The plaintiff insists that the judgment should be reversed because one of them was counted for the defendant, notwithstanding the fact that the other two were counted for himself. It is claimed,

however, that the ballots referred to in findings numbered 6 and 7 are not in the record, and that no question is made as to their competency or admissibility in evidence. This may be true, but we are not dealing with the ballots, but with the ultimate facts as found by the court; and the question for our determination is whether, upon such facts, the judgment should be affirmed or reversed. And, as it appears that there were cast for the defendant more legal votes for the office of county clerk than were cast for the plaintiff, the judgment of the court below is manifestly right, and ought to be affirmed. While the defendant could not claim any advantage from the ruling of the court against him for the purpose of obtaining in this court a more favorable judgment than he obtained in the court below, yet he is entitled to the benefit of any error made by such court in counting ballots for the plaintiff, for the purpose of upholding and sustaining the judgment from which the appeal is taken.

The other questions referred to in the petition for rehearing were all carefully considered, and are disposed of in the former opinion, and we do not deem it necessary to go over them again.

REHEARING DENIED.

Argued 13 February; decided 27 March, 1899.

AMBROSE v. HUNTINGTON.

[56 Pac. 513.]

1. SUFFICIENCY AND EFFECT OF ADVERSE POSSESSION.—Enclosing a tract of land and continually using it under color of title and claim of right constitute such an adverse possession as will start the statute of limitations, and, if continuous for the required time, will confer title, at least as between individuals: *Joy v. Stump*, 14 Or. 381, cited.
2. PUBLIC LANDS—RATIFICATION OF AGENT'S ACT.—County school superintendents are not the agents of the state to execute deeds to its school lands, but the state ratifies and becomes bound by their contracts to convey such lands when it accepts and retains the purchase price.

34	484
39	214

34	484
41	614

34	484
43	280
43	386

34	484
44	102

3. **STATUTE OF LIMITATIONS—ADVERSE POSSESSION—BOND FOR DEED.**—Where a vendee has gone into possession of land under a contract to purchase, his holding is adverse to the vendor from the time he complies with his part of the agreement, and the same rule applies to the state as to a natural person: *Hill's Ann. Laws*, § 13, and *Anderson v. McCormick*, 18 Or. 301, cited.
4. **IDEM.**—A deed to land as to which an adverse possession against the grantor has ripened into title is ineffectual for any purpose.
5. **REAL PROPERTY—EFFECT OF NOTICE BY OCCUPATION.**—The open, notorious and exclusive possession and occupancy of real property by a stranger to the title puts a purchaser from a third person upon notice and inquiry concerning the rights and equities of the party in possession, and charges him with all the knowledge that he might have obtained upon reasonable inquiry: *Exon v. Dancke*, 24 Or. 110, followed.

From Douglas: J. C. FULLERTON, Judge.

Suit by A. T. Ambrose against Benjamin Huntington to quiet title to certain lands. Plaintiff appeals from a decree against him.

REVERSED.

For appellant there was a brief and an oral argument by *Messrs. Wm. R. Willis* and *Andrew M. Crawford*.

For respondent there was a brief over the name of *J. W. Hamilton*, with an oral argument by *Mr. Frank W. Benson*.

MR. CHIEF JUSTICE WOLVERTON delivered the opinion.

This is a suit to quiet title to the west $\frac{1}{4}$ of the southwest $\frac{1}{4}$ of section 16, township 23 south, range 5 west, in Douglas County, Oregon. After denying the material allegations of the complaint, which are in the usual form, the defendant alleges ownership and possession of the premises, and sets up his muniments of title thereto—in effect, that the State of Oregon conveyed the same to Joseph Durbin on March 15, 1892, and he to the defendant on May 20, 1895. He further alleges that at the time of his purchase from Durbin he had no notice or know-

ledge as to plaintiff's claim of title, and was, therefore, an innocent purchaser for value. The decree of the court below was for defendant, and plaintiff appeals.

It is shown by the testimony that on February 8, 1866, E. A. Lathrop, County School Superintendent of Douglas County, Oregon, sold the land in question to plaintiff for the consideration of \$160, of which he paid one-fourth down, and executed and delivered to that officer his three promissory notes, for \$40 each, for the balance of the purchase price, payable in one, two, and three years after date, with interest at ten per cent. per annum, payable semi-annually. The two notes payable latest in time were written upon one sheet of paper, and indorsed as follows: "June 17, 1867. Received payment in full on within notes. Andrew Jones, County Treasurer." These notes were given in evidence by the plaintiff, who says he believes he paid the other note, but does not remember distinctly. He further testifies, in substance, that he procured a bond for a deed to the land, and sent the same, with some deeds which had been executed and delivered to him by the county school superintendent of said county, to a party in Salem by the name of John Godell, for the purpose of obtaining a confirmatory deed from the state for the lands described therein; that he soon after received a deed from the state, bearing date March 22, 1881, which he had recorded September 18, 1883, but the premises conveyed thereby are described as "the northeast quarter of southwest quarter, the northwest quarter of southeast quarter, and lots four, five, six, eight, and nine, of said section sixteen," and, of course, do not include the land in dispute; that he did not become fully aware of the error until defendant began to claim the land; and that he never believed the deed from the state described all the land purchased by him.

It is further shown that the plaintiff went into posses-

sion in 1866; that he inclosed the land in dispute, with his other lands, in 1868; and that he has maintained the inclosure ever since, with some few intermissions, when portions of the fencing broke down through decay or were destroyed by fire. The evidence upon the subject is somewhat voluminous and not a little conflicting; but it sufficiently appears therefrom that the land in question lies in a mountainous region, fit only for pasturage; that the plaintiff entirely inclosed it in 1868, with other lands of his, by a substantial fence consisting of rails, logs, and brush, and, it may be, at some parts it was joined to natural obstructions ordinarily sufficient to turn stock; and that, considered as a whole, the fencing was of the nature usually employed in districts of that character. At some points it was constructed somewhat off the line, and included some three acres of railroad land, and five or six acres of land belonging to Mr. Long. This fact, however, is not material, as the other land inclosed was inconsiderable, and the fencing may be said to have been placed substantially upon boundary lines, except where it was built entirely upon and through plaintiff's land. Plaintiff thereafter used and employed the land thus inclosed for pasturing his sheep and other stock, and has had it in possession and use for that purpose ever since. The fencing may have been maintained indifferently at periods, but the plaintiff has renewed it from time to time, and practically kept it in such a condition as to form a substantial inclosure, up to the time that defendant asserted title thereto; and during all the while plaintiff claimed the entire ownership and title to the land, and so occupied it, in exclusion of all others. The defendant, to prove his title, introduced a deed from the State of Oregon to Joseph Durbin, bearing date March 15, 1892, and one from Durbin to himself, of date May 20, 1895. Further

than this, it is shown, practically, that plaintiff paid the taxes upon the land until 1892, and thereafter defendant paid them.

Several questions of legal import are presented by the record. It is insisted that plaintiff was not in possession at the commencement of the suit, and, of course, if such was the case, he could not maintain it; but, in our view, the testimony is quite sufficient to establish actual possession on his part at the time. The defendant claims to have been in possession, but the only act shown which would indicate it is that he went upon the land a short time before suit was begun, and posted notices thereon warning people to keep off the same, and notifying them that he was the owner of the property. Otherwise, he had neither actual nor constructive possession.

1. Another contention is that plaintiff's possession was not of such a nature as to render it adverse. We think otherwise. It was, from its inception, actual and under color of title. The maintenance of a substantial inclosure, and the continued use and occupation of the land for pasturage of stock (the only purpose for which it was adapted), under claim of right and title, constituted such a visible, open, notorious, distinct, exclusive, and hostile possession as to set the statute of limitations running, and, if continuous during the full period contemplated by the statute, would operate to confer title, at least as between individuals, where the state is not concerned: *Joy v. Stump*, 14 Or. 361 (12 Pac. 929); *Worthley v. Burbanks*, 146 Ind. 534 (45 N. E. 779).

2. It may be observed, in passing, that the county school superintendent was not the agent of the state, with power to execute a deed to its school lands; but, as he had contracted to convey the same, and the state had received, accepted, and retained the purchase price, it thereby became bound to the observance of his con-

tracts regarding the land, as it operated as a ratification of his acts in the premises (Mechem, Agency, §§ 148, 149), so that there was substantially a contract on the part of the state with plaintiff to convey to him the premises in dispute.

3. But the question of vital importance is whether the statute of limitations began to run in favor of plaintiff and against the state at any time while it held and retained the legal title. The testimony is a little meager touching the bond and its terms relative to the time when the plaintiff became entitled to his deed; but it may be inferred that he became entitled thereto at the time when the purchase price was fully paid, or, at any rate, at the time he sent the bond to Salem for the purpose of obtaining a confirmatory deed. It may be said that its obligation to make this conveyance became matured and fixed, by full performance on plaintiff's part, not later than March 22, 1881, which was the date of his deed from the state containing the wrong description. It is a rule of law, now uncontroverted, that where the vendee, under a contract or agreement to purchase land, has executed or performed the agreement on his part by full payment of the purchase money, his possession from that time becomes adverse to that of the vendor, having gone into possession primarily under the agreement: *Anderson v. McCormick*, 18 Or. 301 (22 Pac. 1062); 2 Wood, Lim. § 260; *Ridgeway v. Holliday*, 59 Mo. 444; *School District v. Blakeslee*, 13 Conn. 227; *Catlin v. Decker*, 38 Conn. 262. There was here, then, a subsisting and binding contract on the part of the state to convey to the plaintiff the land in dispute; and it would seem that, if it had brought an action to recover possession, the contract would have been a complete defense on the part of Mr. Ambrose. Such being the case, there was such a possession and claim of title as set the statute

of limitations running against the state: Hill's Ann. Laws, § 13; *Richards v. Griffith*, 1 Kan. App. 518 (41 Pac. 196).

4. The continuous maintenance of such adverse possession under claim of title from 1881 until the time suit was instituted (a period of time much longer than ten years), in view of the contractual relations alluded to, operated to invest the plaintiff with a perfect title, even prior to the execution and delivery of the deed by the state to Durbin; and the latter, therefore, acquired no title to the land in dispute by virtue of such deed.

5. Touching the question of good faith, it is settled that an open, notorious, and exclusive possession and occupancy of real property by a stranger to the title is sufficient to put a purchaser from another upon notice and inquiry concerning the rights and equities of the party in possession, and will charge him with all the knowledge that he might have obtained upon reasonable inquiry: *Petrain v. Kiernan*, 23 Or. 455 (32 Pac. 158); *Bohlman v. Coffin*, 4 Or. 313; *Exon v. Dancke*, 24 Or. 110 (32 Pac. 1045).

We are impelled, therefore, under the facts pertaining to this controversy, to impute to the defendant full notice and knowledge of the plaintiff's right and title to the land at the time he purchased of Durbin, and hence conclude that he could not have been an innocent purchaser for value. He was fully aware of the plaintiff's possession, and of his claim of right and title to the premises long prior to the time he obtained the deed from Mr. Durbin. This is manifested from the fact that some eight years prior to the commencement of this suit he was employed and paid by the plaintiff for his services in building a fence along the west boundary line of the land in dispute and upon the line between it and the lands now owned by him. He has lived in the neighbor-

hood for a number of years, and was fully cognizant of plaintiff's claim of ownership of the premises. It seems to have been common reputation among persons living in the neighborhood that plaintiff was the owner and in full and complete possession of the land for many years. In pursuance of these considerations, the decree of the court will be reversed, and one here entered in accordance with the prayer of the complaint.

REVERSED.

Argued 29 March; decided 10 April, 1899.

BOTEFUHR v. ROMETSCH.

[56 Pac. 803.]

COMPETENCY OF EVIDENCE—AGENCY.—In an action to recover for goods sold, on an issue as to whether defendant purchased for himself, or as the agent of his wife, evidence that the business for which the goods were purchased was owned and conducted by him in the name of his wife was competent, though tending to show that he carried it on in her name for the purpose of defrauding his creditors: *Siglin v. Coos Bay R. R. Co.*, 26 Or. 387, distinguished.

From Multnomah: **ALFRED F. SEARS JR.**, Judge.

This is an action by Frank Botefuhr to recover \$80.45 for goods, wares, and merchandise alleged to have been sold and delivered to John Rometsch at his special instance and request. The complaint is in the usual form in such actions. The answer denies the material allegations of the complaint, and for further and separate defense alleges that, at the time of the purchase of the goods referred to in the complaint, the defendant, as the plaintiff well knew, was the agent and employee of one Kate Rometsch, and that as such agent he bought the goods for her, and not for himself. A reply having put in issue the allegations of the answer, a trial was had, resulting in a verdict and judgment in favor of the plaintiff, and defendant appeals.

AFFIRMED.

For appellant there was a brief over the names of *Edward Mendenhall* and *Raphael Citron*, with an oral argument by *Mr. Mendenhall*.

For respondent there was a brief over the names of *William M. Davis* and *Ralph Platt*.

MR. JUSTICE BEAN, after stating the facts, delivered the opinion of the court.

Upon the trial the defendant gave evidence tending to sustain the allegations of his answer, and to show that the goods in question were purchased by him as the agent of his wife, for use in a saloon owned and conducted by her. The plaintiff thereupon, in rebuttal, called one *Liebe*, who was permitted, over defendant's objection, to testify in substance, that the defendant was in fact the owner of the saloon referred to, and that his wife's name was used by him in conducting the business to enable him to defraud his creditors. At the proper time the defendant requested an instruction that the question of fraud was not involved in the case, and should not be considered by the jury, which the court refused to give, but, on the contrary, instructed that: "In a transaction of that kind, you have the right to examine the various aspects for the purpose of determining what was the actual relation between the parties. If the object was to defraud, or to commit a fraud upon the creditors of the defendant, and if the business was carried on in his wife's name as a mere cover for the purpose of carrying out that object, then, of course, it could not avail; it could not be upheld." The giving of this instruction, the refusal to instruct as requested, and the admission of *Liebe's* testimony, the defendant contends, were error; because not within the issues made by the pleadings;

and he invokes the rule announced in *Coos Bay R. R. Co. v. Siglin*, 26 Or. 387, 392 (38 Pac. 192), in support of his contention. But we do not understand that it has any bearing whatever on the case at bar. In that case it was sought to impeach the title of a purchaser of personal property on the ground that the purchase was made for the purpose of aiding the seller in defrauding his creditors, without setting up such fact in the pleadings. But in this case the question was whether the saloon business, for which the goods alleged in the complaint were purchased by the defendant, was owned and conducted by him or Kate Rometsch; and any evidence bearing upon that question was competent, although it may have tended to show that the defendant's object was to cover up his property for the purpose of defrauding his creditors. No title to property is involved in this case, nor is it a proceeding to uncover property concealed from creditors. It is simply an action to recover for goods sold and delivered, and the only question was whether the defendant purchased such goods for himself, or as the agent of his wife. Any evidence bearing upon that question was competent and proper to be submitted to the jury. The judgment is affirmed.

AFFIRMED.

Argued 31 January, 1899; decided 27 March, 1899.

MALARKEY v. O'LEARY.

[56 Pac. 521.]

1. **JURISDICTION OF JUSTICES OF THE PEACE—REAL PROPERTY ACTIONS.**—Under Hill's Ann. Laws, § 909, subd. 1, providing that the jurisdiction of a justice's court shall not extend to an action in which the title to real property is in question, and section 2081, which provides that if it appear, "from the evidence of either party, that the title to lands is in question, which title shall be disputed by the other party," the case shall be certified to the circuit court, the justice does not lose jurisdiction of an action over which he otherwise has jurisdiction because the pleadings make an issue of title to realty. That result is accomplished only when it appears on the trial from the evidence that the title to land is actually contested: *Sweek v. Galbreath*, 11 Or. 516, cited.

34	496
43	579

2. **PENALTY FOR FAILURE TO DISCHARGE MORTGAGE.**—It is no defense in an action for a penalty under Hill's Ann. Laws, § 3034, for refusal or neglect to discharge a mortgage, that the mortgagor is indebted to the mortgagee outside of the mortgage debt.
3. **IDEM.**—Attorney's fees incurred in the preparation for foreclosure proceedings are not "reasonable charges" within Hill's Ann. Laws, § 3034, prescribing a penalty for the neglect or refusal of a mortgagee upon request to discharge a mortgage after performance of the condition and tender of his "reasonable charges;" by that term the statute contemplates only such charges as may reasonably be incurred in the matter of the discharge of the mortgage.
4. **IDEM.**—The fact that a mortgagee acted in good faith in refusing to discharge a mortgage after payment, under the honest belief that he need not do so until payment of expenses incurred in preparation for foreclosure proceedings, does not relieve him from liability for the penalty provided by Hill's Ann. Laws, § 3034.

From Multnomah: ALFRED F. SEARS JR., Judge.

This action was brought in a justice's court by James A. Malarkey against Charles M. O'Leary to recover the penalty provided in Section 3034, Hill's Ann. Laws, for the refusal of a mortgagee to discharge a mortgage. The complaint avers, in substance, that on February 8, 1895, one William C. Holman, who was the owner of certain real estate in Portland, mortgaged the same to the defendant to secure the payment of a promissory note for the sum of \$200, due ninety days after date; that on October 16, 1895, Holman, by warranty deed, transferred and conveyed the mortgaged property to plaintiff, who ever since has been, and now is, the owner thereof; that, contemporaneous with such conveyance, and as a part of the same transaction, the plaintiff paid to the defendant the amount due on the note referred to, and it was canceled and delivered up to him, and all the conditions of the mortgage fully performed and complied with; that on the twenty-fifth of March, 1896, the plaintiff requested the defendant to discharge the mortgage, or execute and acknowledge a release thereof, offering to pay all costs and charges therefor, but the defendant refused to comply with such request. A demurrer for want of juris-

diction having been overruled, the defendant answered, admitting the execution and delivery of the note and mortgage as alleged in the complaint, the subsequent payment and satisfaction of the note, and compliance with the terms and conditions of the mortgage, but denying upon information and belief the alleged title of Holman and the plaintiff to the mortgaged premises, and for a further and separate defense alleged that at their maturity the defendant placed the note and mortgage in the hands of his attorneys for foreclosure; that, in making preparation for that purpose, they performed work and services of the reasonable value of \$10, which Holman agreed to pay if defendant would postpone foreclosure proceedings for a time; that, relying upon this promise and agreement, the defendant refrained from instituting such proceedings, but Holman has not paid said sum, or any part thereof, and it is still due and owing to the defendant. The plaintiff demurred to the new matter in the answer, on the ground that it did not state facts sufficient to constitute a defense to the cause of action set forth in the complaint, and at the same time moved to strike out certain denials. The motion was overruled, and the demurrer sustained. Thereafter the cause was tried by the justice, and a judgment rendered in favor of the plaintiff for the amount demanded, besides costs and disbursements. From this judgment the defendant appealed to the circuit court, where the ruling of the justice court upon the motion and demurrer was sustained. Upon the trial in the latter court, the defendant objected to the admission of any evidence tending to show that the plaintiff had purchased or acquired the title to the mortgaged premises, on the ground that the question of title to real property was involved, and therefore the justice's court had no jurisdiction. This objection was overruled, and defendant excepted. The trial thereafter

proceeded, resulting in a judgment against the defendant, from which he appeals to this court, and insists that neither the justice's nor the circuit court had jurisdiction of the case, for the reason that the title to real property was in issue, and that the court erred in sustaining the demurrer to the separate defense set up in the defendant's answer.

AFFIRMED.

For appellant there was a brief over the names of *O'Neil & Thompson*, and *C. H. Meusdorffer Jr.*, with an oral argument by *Mr. Mark O'Neil*.

For respondent there was a brief and an oral argument by *Messrs. Schuyler C. Spencer* and *Daniel J. Malarkey*.

MR. JUSTICE BEAN, after stating the facts, delivered the opinion of the court.

1. The claim of want of jurisdiction is founded on subdivision 1 of section 909 of the statute (Hill's Ann. Laws), which provides that the jurisdiction of a justice's court shall not extend "to an action in which the title to real property shall come in question;" and the contention is that when, in an action in such court, the title to real property is put in issue by the pleadings, the justice is necessarily ousted of jurisdiction, and a judgment thereafter rendered is void, and that jurisdiction cannot be acquired by an appellate court upon an appeal therefrom, but we are unable to concur in this position. Section 2081, Hill's Ann. Laws, furnishes the rule by which it shall be determined when the title to real property "comes in question" in a civil action in a justice's court, and points out the method of procedure in such case, by providing that "if it appear on the trial of any cause before a justice of the peace, from the evidence of either

party, that the title to lands is in question, which title shall be disputed by the other party, the justice shall immediately make an entry thereof in his docket and cease all further proceedings in the cause, and shall certify and return to the circuit court of the county a transcript of all the entries made in his docket relating to the case, together with all the process and other papers relating to the action, in the same manner and within the same time as upon an appeal; and thereupon the circuit court shall proceed in the cause to final judgment and execution in the same manner as if the said action had been originally commenced therein, and costs shall abide the event of the suit." It is obvious that the several provisions of the statute concerning the jurisdiction of a justice's court were enacted with the common purpose of prohibiting such courts from trying actions in which the title to real property is in fact in question; but a mere issue of title made by the pleadings is not of itself sufficient, under the statute, to oust the court of jurisdiction. It must appear, from the evidence as offered or given on the trial, that the title to land is in fact in question, and is disputed by the other party. An issue of title may be made by the answer, and afterwards waived, and no evidence offered or given upon the subject whatever. In such case the question of title could not in any sense come in issue, or be determined by the justice. Under the statute a justice not only has the right, but it is his duty, to enter upon the trial of a cause over which he otherwise has jurisdiction, notwithstanding an issue of title made by the pleadings, and, unless it appears at the trial, from the evidence, that the title to land is actually in dispute, to proceed and try the case out and render judgment.

This is the construction given to similar statutes by

the courts of other states, and is manifestly the object and purpose of the act of 1885: *Sweek v. Galbreath*, 11 Or. 516 (6 Pac. 220). The Constitution of the State of Minnesota provides that "no justice of the peace shall have jurisdiction in any case involving the title to real estate," and it was held in *Goenen v. Schroeder*, 8 Minn. 387, under a statute almost identical in language with our section 2081, that, even when the issue tendered by the answer in an action in a justice's court is one of title, an appellate court could not say the justice acted beyond his jurisdiction, unless it was shown from the record that the title came in question on the evidence at the trial. In *Delzell v. Railway Co.*, 89 Iowa, 208 (56 N. W. 433), under a statute providing that, if the title to real property be put in issue by the pleading, supported by affidavit, the justice shall certify the case up to the circuit court, it was held that an answer putting title in issue, if not supported by affidavit, would not oust the justice of jurisdiction, notwithstanding a constitutional provision that a justice's court should not have jurisdiction where title to real property came in question. To the same general effect are *Melloh v. Demott*, 79 Ind. 502; *Mazam v. Wood*, 4 Blackf. 297; *Rogers v. Perdue*, 7 Blackf. 302; *State v. Cotton*, 29 Minn. 187 (12 N. W. 529); *Radley v. O'Leary*, 36 Minn. 173 (30 N. W. 457). It follows from this rule, that before it can be held that a justice's court was without jurisdiction, upon the grounds suggested, it must be shown that it appeared on the trial in such court, from the evidence, that the title to land was in question. The record does not show that any such evidence was offered or given, or that the title came in question in the justice's court, or that any objection was made to proceeding with the cause on that account. We are of the opinion, therefore, that the circuit court

did not err in ruling and holding that the justice's court had jurisdiction to render the judgment from which the appeal was taken.

2. The remaining question is whether the new matter set up in the answer constituted a defense. The statute under which the action was brought reads as follows: "If any mortgagee, or his personal representative or assignee, as the case may be, after full performance of the conditions of the mortgage, whether before or after a breach thereof, shall for the space of ten days after being thereto requested, and after tender of his reasonable charges, refuse or neglect to discharge the same as provided in this title, or to execute and acknowledge a certificate of discharge or release thereof, he shall be liable to the mortgagor, his heirs or assigns, in the sum of \$100 damages, and also for all actual damages occasioned by such neglect or refusal, to be recovered in an action at law." Hill's Ann. Laws, § 3034. Under this section a mortgagor, his personal representative, or assignee, is entitled to have the mortgage satisfied within the time specified, after full performance of its conditions and tender of his reasonable charges. The complaint alleges payment of the mortgage debt, cancellation and surrender of the note, and performance of the conditions of the mortgage. None of these allegations are denied by the answer. Nor is it claimed that the payment of the amount referred to therein is a condition of the mortgage or secured by it. The conditions of the mortgage having been admittedly performed, the mortgagor or his assigns had a right to its discharge of record, and the purpose of the statute is to quicken the diligence of a mortgagee in this regard. An unsatisfied mortgage of record is constructive notice of the existence of a debt, and necessarily tends to injuriously affect the pecuniary standing and credit of the mortgagor. When it is paid,

the statute has provided for its satisfaction on the record, so that the fact of payment may be known to the world. The reasonableness of the requirement is apparent. To insure its observance, the mortgagee is required to acknowledge the satisfaction of a mortgage, when paid, in as public a manner as the mortgagor had acknowledged its existence, or suffer the statutory penalty. And it is no defense that the mortgagor may be otherwise indebted to the mortgagee.

3. It is also claimed by the defendant that the "reasonable charges" contemplated by the statute would include attorney's fees incurred in the preparation for foreclosure proceedings; but the statute manifestly contemplates only such charges as may reasonably be incurred in the matter of the discharge of the mortgage: *Collar v. Harrison*, 30 Mich. 66.

4. He also claims that the answer is sufficient, because it shows that the defendant was acting in good faith and under an honest belief that he was not required to satisfy the mortgage until the payment of the sum mentioned in the answer. But his good faith is no defense. Although the statute is penal in its character, the good faith of the mortgagee in refusing to cancel a mortgage of record will constitute no defense to an action brought to recover the penalty provided for in the statute, after the terms and conditions of the mortgage have admittedly been complied with: *Boyes v. Summers*, 46 Neb. 308 (64 N. W. 1066); *Shields v. Klopff*, 70 Wis. 69 (35 N. W. 284). Where there is an honest dispute between the mortgagor and mortgagee as to the amount due on the mortgage, or as to whether its terms and conditions have been fully complied with, it may be that a court would refuse to enforce the penalty, if it should appear that the mortgagee was acting in good faith in refusing to satisfy the mortgage, although its terms and condi-

tions had in fact been fully complied with: *Canfield v. Conkling*, 41 Mich. 371 (2 N. W. 191). But no such question is involved in this case, because the pleadings admit, and it is conceded throughout, that the mortgage debt had been paid, and the terms and conditions of the mortgage complied with, and that the defendant refused and neglected to discharge the mortgage for the space of more than ten days after he had been requested to do so. We conclude that the new matter in the answer constituted no defense to the action, and that the court committed no error in sustaining the demurrer thereto. It follows that the judgment of the court below must be affirmed, and it is so ordered.

AFFIRMED.

Decided 10 April, 1899.

BURRELL v. KERN.

[58 Pac. 809.]

34	501
42	256
34	501
43	849

EXECUTORS—RIGHT OF ACTION.—Executors may sue either individually or in their representative capacity, at their option, on causes of action, whether in contract or in tort, accruing after the death of the intestate or testator; hence, in such cases, the complaint need not show for whose estate they are executors.

From Multnomah: JOHN B. CLELAND, Judge.

This is a suit to foreclose a mortgage. The plaintiffs are styled, in the caption or title of the complaint, "Walter F. Burrell and D. P. Thompson, Executors," and it is alleged, among other things, that at all the times stated in the complaint plaintiffs were, and now are, the duly appointed, legally qualified, and acting executors of the last will and testament of M. S. Burrell, deceased, and that defendants made, executed, and delivered to plaintiffs their certain promissory note, a

copy of which is set out, showing that it was made to "W. F. Burrell and D. P. Thompson, Executors." It is further alleged that, for the purpose of securing the payment thereof, defendants duly made, executed, and delivered to plaintiffs their certain mortgage; and in all other respects the complaint is in the usual form. The defendants filed a motion to require plaintiffs to make the complaint more definite and certain, so as to show the name of the deceased person for whose estate the plaintiffs sue as the alleged executors. This was overruled, and thereupon a general demurrer was interposed, assigning as ground therefor that the complaint does not state facts sufficient to constitute a cause of suit, which was also overruled, and, defendants refusing to plead further, a decree as prayed for was entered, from which they appeal.

AFFIRMED.

For appellants there was a brief over the names of *William Wallace Thayer* and *Henry St. Rayner*.

For respondents there was a brief over the name of *Dolph, Mallory & Simon*.

MR. CHIEF JUSTICE WOLVERTON, after stating the facts, delivered the opinion of the court.

It seems to be the theory of the defendants that suit was brought by the plaintiffs in their representative capacity as executors; hence the interposition of both the motion and demurrer. But the complaint shows, when the documents upon which it is based, the averments touching them, and its whole scope, are considered, that plaintiffs have sued in their individual, and not their representative, capacity: *Beers v. Shannon*, 73 N. Y. 292. The prevailing rule seems to be, with possibly some few

exceptions, that when the cause of suit or action, whether in contract or in tort, accrues after the death of the testator or intestate, the money, if recovered, will be assets of the estate, and the executor or administrator may sue, at his option, in either his representative or individual capacity: 8 Enc. Pl. & Prac. 658; *Haskell v. Bowen*, 44 Vt. 579; *Grimmell v. Warner*, 21 Iowa, 11; *Mowry v. Adams*, 14 Mass. 327; *Kane v. Paul*, 39 U. S. (14 Pet.) 33; Bliss, Code Pl. (3 ed.), § 53. The use of the word "executors," in the title of the case and in the note, is a mere *descriptio personarum*, and does not of itself operate to attach to plaintiffs a representative character (*Beers v. Shannon*, 73 N. Y. 292; 2 Am. & Eng. Enc. Law, [1 ed.] 334), and may be regarded as surplusage (*Miller v. Kingsbury*, 128 Ill. 45, 21 N. E. 209). As the note and mortgage in question were made, executed, and delivered to the plaintiffs, and not to their testator, they were authorized, under the rule, to sue in either their representative or individual capacity; and it is very apparent that the complaint states a good cause of suit in one or the other capacity, and is amply sufficient as against the test of a general demurrer. Now, it was a matter of no moment to the defendants in what character plaintiffs prosecuted their suit to foreclose, as they could have set up whatever defense they may have in this suit as well as if it had been brought in any other form (*Miller v. Kingsbury*, 128 Ill. 45, 21 N. E. 209; and hence there was no error in overruling the motion and demurrer, or in entering the decree appealed from, which will therefore be affirmed.

AFFIRMED.

Decided 3 April, 1890.

WHEELER v. BURCKHARDT.

[56 Pac. 644.]

1. **TAKING DEPOSITION OF ADVERSE PARTY BEFORE TRIAL.**—Under Hill's Ann. Laws, § 814, Subd. 1, and Section 823, authorizing the taking of the deposition of an adverse party previous to the trial before an officer authorized to administer oaths, on the giving of a three-days' notice, unless the court prescribes a shorter time, it is not necessary that the officer taking the deposition should be commissioned by the court.
2. **PRESUMPTION OF SUFFICIENCY OF FINDINGS.**—In an action for a conversion of chattels, the evidence will be presumed to sustain a finding as to their value, in the absence of a bill of exceptions.

From Multnomah: E. D. SHATTUCK, Judge.

Action in justice's court by James N. Wheeler against F. Otto Burckhardt and others. From a judgment dismissing the action, plaintiff appealed to the circuit court, which gave judgment for plaintiff, and defendant Burckhardt appeals.

AFFIRMED.

For appellant there was a brief over the names of *Lawrence A. McNary*, *Frank Schlagel*, and *J. P. Kavanaugh*, with an oral argument by *Mr. Schlagel*.

For respondent there was a brief and an oral argument by *Mr. Clinton C. Palmer*.

MR. JUSTICE MOORE delivered the opinion.

This action was originally commenced in the Justice's Court of Portland District, Multnomah County, to recover damages for an alleged unlawful taking and conversion of personal property. It is averred in the complaint that one C. C. Palmer having duly obtained a judgment in the Justice's Court of East Portland Dis-

trict, in said county, against John W. Moore for the sum of \$17.95, and his disbursements, taxed at \$5.40, an execution was issued thereon, in pursuance of which the plaintiff, as constable of said last-named district, seized certain of Moore's personal property to satisfy the writ; that, while plaintiff was in possession of said property by virtue of said execution and seizure, the defendants, F. Otto Burckhardt, Thomas Parker, and John W. Moore, forcibly took and unlawfully converted the same to their own use, to his damage in the sum of \$23.35, the amount of the judgment and costs; and that in consequence of their unlawful acts he had sustained special damage in the sum of \$33.75, for which he prayed judgment. The defendants having by their answer specifically denied the allegations of the complaint, plaintiff's counsel on September 18, 1896, served upon them and their attorney a notice to the effect that on the twenty-first of that month, at the hour of 2 o'clock in the afternoon, he would take the deposition of Burckhardt, as a witness in said action, before Ernest E. Merges, a Notary Public for Oregon, at Room 520 in the Chamber of Commerce Building, in the City of Portland, and at the same time served a subpoena, issued by Merges as notary public, upon Burckhardt, requiring him to appear as a witness in said action at the time and place specified in the notice. In pursuance of the service of the subpoena, Burckhardt appeared at the time and place designated, returned the witness fees received by him, and refused to be sworn as a witness. When the action was called for trial, plaintiff's counsel moved the court to strike Burckhardt's answer from the files, on the ground of his refusal to be sworn as a witness, or to give his deposition before the notary public, but, the motion being overruled, plaintiff refused to offer any evidence, whereupon the action was dismissed, and he appealed to the circuit court, which

court struck said answer from the files, found that defendant Burckhardt was in default, that the property so converted was of the value of \$30, and gave judgment accordingly, from which Burckhardt appeals.

1. It is contended by defendant's counsel that, inasmuch as Merges had not been commissioned by the justice of the peace to take the deposition of any witness in said action, he was powerless to issue a subpoena, and could not, on the mere notice of plaintiff's attorney, compel Burckhardt to testify in an action pending in said court, and hence the circuit court erred in striking his answer from the files, and in rendering judgment against him. The statute (Hill's Ann. Laws, § 814, Subd. 1), so far as applicable to the case at bar, in designating the person whose deposition may be taken, reads as follows: "The testimony of a witness in this state may be taken by deposition, in an action at law, at any time after the service of the summons, or the appearance of the defendant; and in a special proceeding after a question of fact has arisen therein, in the following cases: (1) When the witness is a party to the action or proceeding by the adverse party." In *Roberts v. Parrish*, 17 Or. 583 (22 Pac. 136), Mr. Justice STRAHAN, in construing this section, and speaking of the right of a party to an action to compel another party thereto to give his deposition, says: "The proper construction of this provision of the Code does not seem to be free from difficulty, but I am inclined to the opinion that subdivision 1 of section 814 grants a right to either party to compel his adversary to give his deposition. This right has no existence independent of this statute, and its sole purpose was to declare and secure that right. It was this and some other similar provisions in the Code that have rendered bills of discovery obsolete, or at least that were designed to take their place, and to extend the field of inquiry

from suits in equity to actions at law." At the common law depositions *de bene esse* could not be read in evidence without the consent of the adversary party; and statutes conferring the right of procuring and preserving the testimony of a witness in this manner, and removing the objections of a party to their being read at a trial, being in derogation of the ancient rule, are to be strictly construed: 9. Am. & Eng. Enc. Law (2 ed.), 300; *Ragan v. Cargill*, 24 Miss. 540.

Either party may take the testimony of a witness in this state by deposition in an action at law after the service of the summons or the appearance of the defendant, before any person authorized to administer oaths, on giving the adverse party notice of the time and place of examination, the name of the officer and the witness. Such notice shall be at least three days, unless the court or judge by order prescribe a shorter time: Hill's Ann. Laws, § 823. A notary public is a person who is authorized to administer oaths: Id. § 2325. The subpoena was issued in pursuance of the authority conferred by Subd. 3 of Section 790, Hill's Ann. Laws, and duly served by a person over eighteen years of age: Id. § 792. Burckhardt was, therefore, obliged to obey the command of the writ directed to him, and requiring his attendance as a witness in said action on plaintiff's behalf: Id. § 846. "Disobedience to a subpoena, or a refusal to be sworn, or to answer as a witness, or to subscribe an affidavit or deposition when required, may be punished as a contempt by the court or officer before whom he is required to attend or the refusal takes place, and if the witness be a party, his complaint, answer, or reply may be stricken out:" Id. § 797. The transcript shows that there has been a strict compliance with all the statutory provisions necessary to produce Burckhardt's deposition, and for his refusal to testify as a witness the court pos-

sessed plenary power to strike out his answer. As we view the provisions of Hill's Ann. Laws, § 823, it is unnecessary to procure an order from the court or judge to take the testimony of a witness in this state by deposition in an action then pending in such court, unless the exigencies of the case demand that his testimony should be taken in a shorter period than that prescribed by law.

It is argued that if a party, at the instance of his adversary, can be compelled to give his deposition before a person who has not been commissioned by the court in which the action is pending, and in the absence of an affidavit showing the materiality of his testimony, such a method of preparing for the trial would be tantamount to a fishing excursion for evidence to support a doubtful cause. The reasons assigned by defendant's counsel seem cogent, but would be more appropriately addressed to the legislative assembly, in whom the power of regulating the mode of procedure in such matters is lodged by the organic law of the state. If such a rule becomes oppressive, the best method of securing its repeal is by the enforcement of its provisions. As it now stands, each party to an action is afforded an opportunity to ascertain prior to the trial his adversary's views of the matters in issue.

2. It is also insisted that the findings of the court do not support the judgment. Burckhardt's answer having been stricken out, the only remaining issue, under the statute, was the value of the property which had been converted (Hill's Ann. Laws, § 249; *Luse v. Isthmus Ry. Co.*, 6 Or. 125; *Fink v. Canyon Road Co.*, 5 Or. 302; *Moody v. Richards*, 29 Or. 282, 45 Pac. 777); and, since the transcript does not contain any bill of exceptions, it must be presumed that the evidence warranted the finding in this respect, and that such finding is consonant with the judgment, which is affirmed. **AFFIRMED.**

Argued 27 February; decided 30 April, 1899.

McKINNEY v. STATESMAN PUBLISHING CO.

[56 Pac. 651.]

1. **CONSTRUCTION OF CONTRACT—HIRING AT WILL.**—A contract of employment for a year containing an agreement that "this contract shall be renewed during the strict performance of its conditions," is a contract at will which may be terminated by either party at his pleasure, after the expiration of the stated period: *Christensen v. Pacific Coast Borax Co.*, 26 Or. 302, cited.
2. **CONSTRUCTION OF CONTRACT—RENEWAL CLAUSE.**—Such a contract, however, imposes on the employer the obligation to renew the contract on the same terms for a second year.
3. **CONSTRUCTION OF CONTRACT—"SETTLEMENT."**—The word "settlement," as used in a contract requiring a collector to pay in moneys as he collects, and make a complete settlement on certain days, means payment, and not a computation of accounts.

From Marion : **GEORGE H. BURNETT**, Judge.

Action by John W. McKinney against the Statesman Publishing Company. From a judgment for plaintiff, defendant appeals.

REVERSED.

For appellant there was a brief over the name of *Hayden & McNary*, with an oral argument by *Messrs. Robert J. Hendricks and J. H. McNary*.

For respondent there was a brief over the names of *George G. Bingham* and *Holmes & Kellogg*, with an oral argument by *Mr. Bingham*.

MR. JUSTICE MOORE delivered the opinion.

This is an action to recover damages for the alleged breach of a contract. It is alleged that defendant, being duly incorporated, entered into a contract with plaintiff, of which the following is a copy: "Agreement entered into between the Statesman Publishing Co., of Salem,

Oregon, and John W. McKinney, of Salem, Oregon. The Statesman Publishing Co. agrees to lease to John W. McKinney, for the term of one year from the date hereof, the route in the City of Salem and its suburbs of the Daily Oregon Statesman newspaper. The said John W. McKinney is to have the exclusive charge of said route for said time for the distribution of papers six days in the week, being each day excepting Monday. He is to collect for said paper fifteen cents per week from each of the present subscribers, or any other persons who may subscribe therefor. For each copy of such paper thus delivered he is to pay us at our office the sum of ten cents per week, and to apply on said account all the moneys he can conveniently collect at the end of each and every week, and to make full and complete settlement of his account for the same on the tenth day of each and every month. He shall have each morning, free, five copies of said paper, a part of which number he shall use each day, as his judgment dictates, as sample copies. When the list shall have reached one thousand, he shall have each morning, free, fifteen copies. He shall be allowed, for the delivery of any papers we may order, five cents per week, and in such cases the papers will not be charged to him. He shall be furnished with the number of papers he orders each morning, folded, at the business office of the paper, in Salem. He shall use his efforts every working day in canvassing to increase the subscription lists of the paper in Salem and suburbs. He shall bear the whole expense of the delivery of and collection for such paper, and at the expiration of this contract by limitation, or through neglect to fulfill its provisions, he shall deliver up to the above company the lists of subscribers, with addresses, so far as he may have them. In the event of the termination of this contract with a balance due us, we shall

be entitled to collect such balance from subscriptions due on such lists, paying over any balance above such amount due us to John W. McKinney, after deducting the reasonable expenses of collection. But the turning over of such lists shall not act as a complete settlement, in case the amount of the indebtedness to us cannot be realized from them. This contract shall be renewed during the strict performance of its provisions. Signed in duplicate this 17th day of May, 1895. Statesman Publishing Co., C. B. Irvine, Mngr. Accepted. J. W. McKinney." It is also alleged that plaintiff performed all the terms of the agreement imposed upon him, notwithstanding which defendant refused to renew the contract, and on May 17, 1896, wrongfully deprived him of said route, to his damage in the sum of \$1,500, for which he prayed judgment. A demurrer on the ground that the complaint did not state facts sufficient to constitute a cause of action having been overruled, the defendant filed an answer, denying the material allegations therein, and alleging new matter to which plaintiff replied; and a trial being had, resulted in a judgment for plaintiff in the sum of \$350, from which defendant appeals.

1. It is contended by defendant's counsel that the clause contained in the agreement that "this contract shall be renewed during the strict performance of its provisions," is indefinite as to time, which renders such provision void, and that the uncertainty in this respect being manifest from an inspection of the complaint, the defect was not cured by answering over. In *McCullough Iron Co. v. Carpenter*, 67 Md. 554 (11 Atl. 176), it is held that the employment of a person for an indefinite time is a hiring at will, which either party can terminate at pleasure. Mr. Justice IRVING, delivering the opinion of the court, says: "There can be no doubt that in this country the rule is, an indefinite hiring is *prima facie* a

hiring at will. It is also well settled that a hiring at so much a week, month, or year, no time being specified, does not of itself make more than an indefinite hiring." In *Lord v. Goldberg*, 81 Cal. 596 (15 Am. St. Rep. 82, 22 Pac. 1126), plaintiff was engaged to perform certain service for defendants, who gave him a written memorandum to the effect that his employment should be permanent, so long as he desired to make it so, but thereafter, being unwilling to submit to a reduction of the compensation which they agreed to pay, he left their service; and, having brought an action to recover the damage alleged to have been sustained, it was held that the memorandum evidenced an employment for an indefinite time, which meant that the relation should continue until either party, for good reason, wished to sever it. In *Evans v. St. Louis, I. M. & S. Ry. Co.*, 24 Mo. App. 114, plaintiff, a locomotive engineer, having been employed by defendant to run one of its engines, for which it agreed to pay him the sum of \$115 a month, was discharged within the month; and, having instituted an action to recover the compensation agreed to be paid for that period, it was held that the agreement to pay a stated sum per month did not, in the absence of other evidence, fix the period of hiring at one month, and that the relation of master and servant was determinable, under such circumstances, at the will of either party. In *Orr v. Ward*, 73 Ill. 318, plaintiff entered into a written agreement with the defendant, by the terms of which the latter agreed to pay him for his services as a traveling salesman the sum of \$2,100 for the year 1873, and \$2,400 for the next year, but in June, 1873, the firm of which defendant was a member having become bankrupt, plaintiff was discharged, whereupon he brought an action to recover the damage which he claimed to have sustained by reason of the breach of said agreement; and it

was held that, inasmuch as there was no undertaking on the part of the defendant to continue plaintiff in his employment for any definite length of time, the latter had no cause of action against him on account of the discharge.

In *Howard v. East Tenn. etc. R. R. Co.*, 91 Ala. 268 (8 South. 868), plaintiff was employed by defendant as its land agent, at a stated salary per month, to perform certain service, under an agreement which contained no stipulation for the continuance of the employment for any definite period, and, having been discharged, he brought an action to recover the damage alleged to have been sustained; but the trial court, having sustained a demurrer to the complaint, rendered judgment against him, in affirming which Mr. Justice COLEMAN, speaking for the court, says: "The material inquiry is whether the contract as stated is not void for uncertainty, or one which either party could terminate at will. No damages are claimed for services past rendered, but for a refusal to continue plaintiff in his employment, and there is no averment as to the time when plaintiff was dismissed. The law does not favor, but leans against, the destruction of contracts because of uncertainty; but, when contracts are so vague and indefinite in terms that the intention of the parties cannot be fairly and reasonably collected from them, the court will not undertake to give them effect." In *Coffin v. Landis*, 46 Pa. St. 426, it was held that where one employs an agent to sell land, under an agreement that the latter shall receive one-half of the net proceeds arising from such sales, and there is no stipulation in the contract as to the duration of the employment, the principal has the right to terminate the relation at any time, and may discharge the agent without notice. As illustrating the principle that employ-

ment at a stated sum per week, month, or year, indefinite as to the term of service, is a hiring at will, which either party may terminate at pleasure, see *Christensen v. Borax Co.*, 26 Or. 302 (38 Pac. 127); *Haney v. Caldwell*, 35 Ark. 156; *De Briar v. Minturn*, 1 Cal. 450; *Perry v. Wheeler*, 12 Bush, 541; *Beach v. Mullin*, 34 N. J. Law, 343; *Prentiss v. Ledyard*, 28 Wis. 131; *Thomas v. Hatch*, 53 Wis. 296 (10 N. W. 393).

2. It is maintained by plaintiff's counsel, however, that the stipulation to renew the contract is analogous to a covenant to renew a lease of real property, and imposed upon defendant the duty of executing a new contract for the term of one year from May 16, 1896, containing all the conditions of the prior agreement, except the stipulation to renew the contract, but that the defendant, having refused to keep its engagements, is liable to their client for the damage which he sustained by reason of such refusal. In *Iron Factory Co. v. Richardson*, 5 N. H. 294, it is held that where a person is hired for a year at a stipulated price, and continues in the same employment afterwards without any new contract, it is to be presumed that both parties intended that the same price is to be continued. Mr. Chief Justice RICHARDSON, in speaking of the implied agreement under which the subsequent service was performed, says: "It is like the case of a tenant holding over after the expiration of his term, without any new agreement, in which case an implication arises that there is a tacit consent on both sides that the tenant shall hold at the old rent." In *Rutgers v. Hunter*, 6 Johns. Ch. 215, it is held that a stipulation contained in a demise of real property whereby the landlord covenanted to "renew the said lease," without specifying the conditions or terms thereof, implied a leasing for the same term as specified in the original lease, with all its conditions, except the cov-

enant to renew. Mr. Chancellor KENT, speaking of the latter condition, in rendering the decision, says: "If a covenant to renew the lease necessarily included a renewal of all the covenants in it, it would be tantamount to a covenant for perpetual renewal, and so extraordinary a covenant ought not to depend on inference merely." In *Creighton v. McKee*, 2 Brewst. 383, Mr. Justice LUDLOW, after announcing the rule by which the intention of the parties is to be ascertained from the inspection of a lease containing a similar provision, says: "Interpreting the clause in the lease before us by the aid of the principles stated, we must come to the conclusion that the word 'This,' in the clause, 'This lease to be renewable at the pleasure of the lessee,' implies, not only the right of renewal, but also upon the terms and for the time specified in the instrument, at the will and pleasure of the lessee, for at least another term." So, too, in *Cunningham v. Pattee*, 99 Mass. 248, Mr. Justice FOSTER, in construing a clause of a lease which contained the following provision, "And the said lessors do promise to renew said indenture for such further term as their leasehold estate in the premises may be renewed or extended,"—says: "The covenant to renew is not void for indefiniteness. The word, *ex vi termini*, implies the giving of a new lease like the old one, with the same terms and stipulations, at the same rent, and with all the essential covenants." The method adopted to ascertain the meaning of the word "renew," as used in a lease of real property, where no definite time is prescribed, applies, in our judgment, with equal reason, to the meaning of the word as used in the contract under consideration; and, this being so, defendant was required thereby to permit plaintiff to continue the service for the term of another year, upon the same conditions as are mentioned

in the agreement, except as to the stipulation to renew, and hence the complaint states facts sufficient to constitute a cause of action.

3. The court instructed the jury in relation to plaintiff's duties as follows: "It would be a proper compliance with that condition of the contract, if he turned over at the end of every week all the money he could conveniently collect; and, in order for them to show a violation of that condition of the contract, it would be necessary to show that he had collected money, and had not turned it over. No matter how much he might remain in debt to them at the end of the week, or tenth of the month, if he had not collected the money under the contract, it would not constitute a violation of this contract, if he had a settlement on the tenth of each month; and a 'settlement' means nothing more than to get together and determine upon a balance which is ascertained to be due. It does not require that he make a payment on the tenth of each month. He is only required to apply all money on that account that he had collected during the week." Defendant's counsel, having excepted to this portion of the charge, contend that the court erred in not instructing the jury that the word "settlement," as used in the contract, meant payment. While the word "settlement" sometimes means an adjustment between persons concerning their dealings or difficulties, whereby a balance is ascertained to be due from one to the other, or an agreement is entered into which terminates their controversy, the word may also be construed to mean a payment of the amount found to be due on the examination of their mutual accounts according to the intention of the parties: 22 Am. & Eng. Enc. Law (1 ed.), 488; *Fort v. Gooding*, 9 Barb. 371; *Baxter v. State*, 9 Wis. 38; *National Bank v. Norton*, 1 Hill, 572. We think an examination and consideration of the con-

tract as a whole shows that the word "settlement," as used therein, was intended by the parties as a payment of the amount ascertained to be due on the tenth of each month. It will be seen that plaintiff was required to pay the sum of ten cents per week for each copy of the newspaper which he might deliver to subscribers whom he might secure; and it was provided that upon a termination of the contract the subscription lists should be delivered to defendant, from which it was entitled to collect any balance due from plaintiff, but that, if such balance could not be collected from the subscribers, the surrender of the lists should not effect a complete "settlement" of defendant's account. The complete "settlement" to which reference has been made shows that the word in question, as there used, was intended by the parties to mean that the delivery of the subscription lists to the defendant was not to operate as a payment of any balance due from plaintiff to it, unless the same could be collected from the subscribers; thus conclusively showing, we think, that, as elsewhere used in the contract, the word "settlement" means a payment, and plaintiff on the tenth of each month was required to pay for all the papers that he had delivered, except such as he was entitled to under the agreement.

The more difficult problem is whether the exception to the instruction complained of brings up for consideration the identical question passed upon by the trial court. The word "settlement," as before stated, is ambiguous, being susceptible of two meanings; and, if standing alone, it might be difficult for the court, from an inspection of the contract, to say with any degree of certainty in which sense it was intended to be used by the parties. In such cases the rule is well settled that evidence *alibi* the writings is admissible, not to vary or contradict the terms adopted, but to explain the meaning of that

which has been left vague and uncertain: *American Contract Co. v. Bullen Bridge Co.*, 29 Or. 549 (46 Pac. 138). The bill of exceptions does not contain any evidence that might ordinarily have been introduced, tending to explain the meaning of the word, from the absence of which it might be argued that it must be presumed that such evidence was admitted, and conclusively showed that the word "settlement" did not mean a payment, and, therefore, no error was committed in giving the instruction. Such a deduction would logically seem to follow, were it not for the fact that the contract, as hereinbefore interpreted, conclusively shows that the word under consideration was intended by the parties to mean a payment; and, this being so, the seeming ambiguity is resolved, thereby rendering any evidence tending to explain the meaning of the word inadmissible, and showing that such presumption cannot be invoked. The court having erred in giving this instruction, it follows that the judgment is reversed, and a new trial ordered.

REVERSED.

Decided 14 September; rehearing denied 17 October, 1898.

BANK OF COLFAX v. RICHARDSON.

[54 Pac. 350.]

1. **COLLATERAL ATTACK ON JUDGMENT.**—The record of the proceedings of a superior court cannot be collaterally attacked for errors or irregularities appearing on its face, unless they affirmatively show an absence of jurisdiction.
2. **JURISDICTION BY ATTACHMENT—NONRESIDENT.**—In Oregon the preliminary seizure of the property of a nonresident in an action on a money demand is not a statutory prerequisite to jurisdiction; that requirement is entirely judicial.
3. **JURISDICTION OVER ATTACHED PROPERTY OF NONRESIDENT.**—In an action against a nonresident on a money demand, the actual seizure of property of the defendant under a lawful writ of attachment issued in such action confers jurisdiction over the property seized, as against a collateral attack, though there may be errors in the attachment proceedings, or in determining the liability of the property for the plaintiff's demand.

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4. **ACQUIRING JURISDICTION IN ACTIONS AGAINST NONRESIDENTS.**—Under a system where the attachment is merely auxiliary to the main action, and the proceedings are the same against both resident and nonresident debtors, the authority to proceed to judgment depends upon the personal or constructive service of the court's process, and upon the actual seizure of the property to be affected by the judgment, and not upon the regularity of the attachment proceedings, or of any step after the service of the process.
5. **COLLATERAL ATTACK ON JUDGMENT.**—The judgment of a superior court against a nonresident acquired by a publication of summons cannot be attacked collaterally for any defect in the attachment proceedings, if such proceedings are not made by statute jurisdictional, unless the record affirmatively shows a want of jurisdiction; that is, if the seizure was complete and the court had authority to pass on the cause of action, the judgment is conclusive on the world, regardless of all irregularities or defects in the attachment or other proceedings.
6. **COLLATERAL ATTACK—ISSUING SUMMONS BEFORE WRIT.**—A judgment *in rem* against attached property in Oregon is not subject to collateral attack because the record does not affirmatively show that a summons was issued in the action at or before the issuance of the writ of attachment.
7. **RETURN ON ATTACHMENT—LEAVING IN CONSPICUOUS PLACE.**—Though Hill's Ann. Laws, § 149, provides that real property shall be attached, if there be no occupant, by leaving a copy of the writ in a conspicuous place thereon, it is enough, as against collateral attack on the resulting judgment, for the return to recite that the copy was left in a conspicuous place, without pointing out the place: *Hall v. Stevenson*, 19 Or. 153, distinguished.
8. **RETURN—OWNERSHIP OF ATTACHED PROPERTY.**—The omission of the return of a levy of attachment upon real property to state that the property attached was the property of the defendant in the writ, does not render it subject to collateral attack.
9. **LEVY OF ATTACHMENT—ABSENCE OF OCCUPANT.**—A return on a writ of attachment reciting that when the writ was served there was "no occupant thereof on the premises," should be construed to mean that the place was entirely unoccupied, rather than that the premises were actually occupied, but that the occupant was temporarily absent at the time of the officer's visit.
10. **IDEM.**—Under Hill's Ann. Laws, § 149, providing that real property may be attached by leaving a copy of the writ in a conspicuous place thereon, if there be no occupants, a valid attachment of real property may be made by leaving a copy of the writ in a conspicuous place thereon, if the officer at the time of visiting the land for the purpose of attaching it cannot find any one visibly in possession.
11. **LEVY OF ATTACHMENT—LEAVING A COPY OF WRIT.**—A return of an officer that he attached real estate by "posting" a copy of the writ in a conspicuous place thereon sufficiently shows, as against a collateral attack on a judgment, the "leaving" of a copy in such place.
12. **OWNERSHIP OF PROPERTY BY DEFENDANT—AFFIDAVIT FOR ATTACHMENT.**—An affidavit on which was based an order for publication of a summons sufficiently shows, as against collateral attack, that the nonresident defendants had property in the state, by a recital that the attachment was levied "on certain real property of the defendants, in B. County, Oregon:" *Pike v. Kennedy*, 15 Or. 420, cited.
13. **AFFIDAVIT FOR ATTACHMENT—RESIDENCE OF DEFENDANTS.**—An affidavit for publication of summons sufficiently shows, as against collateral attack,

that defendants could not be served in the state, by a statement that they reside in the State of Washington, and that at the time of making the affidavit they were not in Oregon: *Pike v. Kennedy*, 15 Or. 420, cited.

14. ORDER FOR PUBLICATION—RETURN OF “NOT FOUND.”—A return of a summons “not found” is not a prerequisite of an order for service by publication, since Hill’s Ann. Laws, § 56, merely requires that the inability to serve the defendant within the state shall appear by affidavit. The provision of section 50, that when it appears by the return that defendant is not found the plaintiff may deliver another summons to be served, or may proceed by publication, does not modify section 50: *Goodale v. Coffee*, 24 Or. 346, cited.
15. ORDER FOR PUBLICATION—MAILING SUMMONS “FORTHWITH.”—Though Hill’s Ann. Laws, § 57, provides that the order for publication of summons shall direct that a copy of the complaint and summons be deposited “forthwith” in the postoffice, addressed to defendant, the omission of the word “forthwith” is not fatal to the proceedings, as against collateral attack, when it appears that the copies were mailed within a reasonable time after the date of the order.
16. MAILING OF SUMMONS “FORTHWITH.”—A summons is mailed “forthwith,” under Section 57 of Hill’s Ann. Laws, if it is deposited in the postoffice on the day of the first publication, provided such publication is within a reasonable time, as, say, a week, after the date of the order.
17. PROOF OF SERVICE OF SUMMONS.—A judgment is not invalid on collateral attack simply because the proof of service of summons is not annexed to or indorsed on the summons itself.
18. WHO MAY MAIL A PUBLISHED SUMMONS—CERTIFIED COPY.—Proof of the deposit of a copy of the complaint and summons in the postoffice pursuant to an order of service of publication need not be made by the sheriff or a person specially appointed therefor, but may be made by any one except the party himself; nor is it necessary that the copy of the summons so deposited shall be certified.
19. JUDGMENT ROLL—SUMMONS.—A judgment is not void and subject to collateral attack because the original summons does not appear in the judgment roll, where the proof of publication of summons as well as the findings and recitals in the judgment show that a summons was in fact issued.
20. FRAUDULENT CONVEYANCE—ATTACHMENT.—Real property fraudulently conveyed by a debtor is as much subject to attachment as though the conveyance had never been made.
21. FRAUDULENT CONVEYANCE—BURDEN OF PROOF AS TO GOOD FAITH.—The burden is upon the defendants, in an action by creditors to set aside a conveyance from an insolvent debtor to his children, to point out definitely the various items going to make up the indebtedness constituting the alleged consideration for the conveyance, where the conveyance and the circumstances under which it was made bear the semblance of an attempt to cover up the property of the debtor: *Marks v. Crow*, 14 Or. 882, approved.

From Benton : J. C. FULLERTON, Judge.

Suit by the First National Bank of Colfax, Washington, against A. C. Richardson and others to set aside certain deeds, and subject the property to certain alleged

judgments said to have been theretofore obtained by said bank against certain of the defendants. There was a decree as prayed, from which defendants appeal.

AFFIRMED.

For appellants there was a series of briefs and an oral argument by *Messrs. Lawrence Flinn, John Burnett, and Arthur L. Frazer*.

For respondent there was a series of briefs over the name of *Cox, Cotton, Teal & Minor*, with an oral argument by *Mr. Wirt Minor*.

MR. JUSTICE BEAN delivered the opinion.

This is a suit to set aside a conveyance from A. C. and Laura R. Richardson to their minor children of certain lands in Benton County, on the ground that it was made for the purpose of defrauding creditors, and especially this plaintiff. The complaint avers, in effect, that on April 21, 1894, the plaintiff commenced three actions in the Circuit Court for Multnomah County—one against the defendant, A. C. Richardson, another against him and his wife, Laura R. Richardson, and the third against him and one J. T. Dook—to recover upon promissory notes of the respective defendants, and caused the real property in question to be attached in each of such actions; that such proceedings were had therein that the plaintiff recovered judgments against the defendants, wherein it was ordered that the property attached be sold, and the proceeds applied to the payment thereof; that a few days before the commencement of such actions, and after the indebtedness upon which they were based had accrued, the defendants, A. C. and Laura R. Richardson, with intent to injure and defraud the plaintiff, and without any consideration, conveyed the premises in question to their

minor children, who are made defendants in this suit. The answer puts in issue the material allegations of the complaint, and alleges that the conveyance referred to was made for a valuable consideration, and in payment of a debt due from the grantors to the grantees. At the time the several actions referred to in the pleadings were commenced and the judgments therein rendered, the Richardsons were nonresidents of the state, and service of the summons was had upon them by publication.

The plaintiff, at the trial, to maintain the issues on its part, and to prove the existence of the several judgments and orders of sale as alleged, offered in evidence copies of the complaint, affidavit, and undertaking on attachment, writ of attachment and return thereon, affidavit and order for publication of summons, proof of publication and of deposit in the postoffice, and the judgment in each of such actions, to the admission of which the defendants objected for the reasons that (1) it does not affirmatively appear in either case, except in the affidavits for an order of publication, that a summons was issued at the time or before the writ of attachment; (2) it does not appear that the writs of attachment were served as required by law, or that the court obtained jurisdiction to direct the service of the summons by publication; (3) it does not appear that the proceedings for the publication of the summons were regular, or that the summons was ever issued or served in the manner required by law. These objections were overruled, and the records admitted in evidence, and of this ruling the defendants complain.

The argument in support of the first objection is that, the judgments in question having been rendered against nonresidents of the state upon service of the summons by publication, the facts essential to the jurisdiction must affirmatively appear upon the face of the record,

and, since an attachment of the property of a nonresident is, under the doctrine of *Pennoyer v. Neff*, 95 U. S. 714, a necessary preliminary jurisdictional step in such cases, the record must affirmatively show, even on a collateral attack, that all the requirements of the statute in reference to the issuance and levy of attachment have been strictly complied with; and, as the writ cannot regularly issue before the summons (*White v. Johnson*, 27 Or. 282, 50 Am. St. Rep. 726, 40 Pac. 511), it is claimed that the judgments in question are void, because it does not affirmatively appear from any competent evidence that the summons had, in fact, been issued at the date of the writ.

1. If this question were here on appeal from the judgments of the Circuit Court of Multnomah County, we might not find it easy to affirm them on satisfactory grounds; but we occupy no such position. The records are introduced collaterally as evidence to sustain the allegations of the complaint in the suit now pending, and we cannot, therefore, disregard them, or refuse to give effect to the judgments, on any other grounds than a want of jurisdiction in the court which rendered them. Any errors or irregularities in the records are of no avail in this proceeding unless they be such as show that the court had no jurisdiction. Our inquiry, therefore, must be confined to the question as to whether the error alleged affects the jurisdiction of the court, and in its consideration it is proper to bear in mind that there is no statute of this state making the seizure under an attachment or otherwise of the property of a nonresident an essential or necessary jurisdictional prerequisite in an action against him. We are not called upon, therefore, to consider the effect of the failure of the record in such an action to affirmatively show that all the statutory jurisdictional requirements have been complied with,

although even in such case the presumptions in favor of jurisdiction will often be sufficient to sustain the judgment when collaterally assailed: *Applegate v. Lexington Mining Co.*, 117 U. S. 255 (6 Sup. Ct. 742).

2. The rule requiring the property of a nonresident in an action on a money demand to be seized under a writ of attachment, and thus brought under the control of the court, before any steps are taken looking to the publication of the summons, is wholly a judicial, and not a legislative, requirement.

3. By the ruling in *Pennoyer v. Neff*, 95 U. S. 714, the proceedings in such an action, even if they conform strictly in every particular to the requirements of the statutes of this state, are ineffectual unless some property of the defendant in the state is brought, at the inception of the case under the control of the court, and subject to its disposition by a writ of attachment or other process adopted for that purpose; and then only to the extent of adjudging that the property so seized is liable for the satisfaction of plaintiff's demand. In other words, the effect of that decision is that an action against a nonresident, who is not personally served with process within the territorial limits of the court, or does not appear in the action, is substantially and to all intents and purposes a proceeding *in rem*, and therefore the property to be affected by the adjudication must be brought under the control of the court in the first instance by an attachment, or some other equivalent act. The soundness of this doctrine is, of course, not to be questioned, but, in our opinion, its requirements are satisfied, and the court acquires sufficient jurisdiction of the *rem* to protect its proceeding from collateral attack, when the property of the defendant has been actually brought within the power and control of the court by a seizure under a lawful writ

of attachment issued in the action, although there may be irregularities, or even error, in the attachment proceedings.

4. Under our system an attachment is merely auxiliary to the main action, and there is no difference in the proceedings thereon in an action brought against a non-resident, upon whom service is necessarily made by publication, and in one brought against a resident of the state, in which personal service is had. In either case the proceedings on attachment have nothing to do with the merits of the cause of action or the jurisdiction of the court to try and determine the controversy between the parties. If personal service is had, the cause becomes a mere action *in personam*, with the added incident that the property attached remains liable for any judgment the plaintiff may recover. But, if service is had by publication, and there is no appearance for the defendant, the action is practically a proceeding *in rem* against the attached property, the only effect of which is to subject it to the payment of the amount which the court may find due the plaintiff. Where no personal service is had, the *res* is brought within the power and control of the court by a seizure under a writ of attachment, but the right to adjudicate thereon is acquired only by the publication of the summons. It is the substituted service, and not the seizure, which gives the court jurisdiction to establish by its judgment a demand against the defendant, and to subject the property brought within its custody to the payment of that demand. In other words, the authority to hear and proceed to judgment depends upon the service of the process and the actual seizure of the thing to be concluded by the judgment, and not upon the regularity of the proceedings by which the control of the property was acquired. When, therefore, the court has the *de facto* custody of the property by virtue of a *de facto*

writ of attachment, and a right to determine whether such property shall be subject to the payment of plaintiff's demand by virtue of constructive service of process, it has full and complete jurisdiction in the premises, and subsequent errors or irregularities in the proceedings will not be available on collateral attack. A judgment founded on service of process by publication is, of course, ineffectual unless it is an adjudication concerning property which the court has in its custody under some lawful process, because there is nothing upon which it can operate; but where the property has been actually seized and brought within the control of the court by some process authorized by law, and the right to determine its liability for the demands of the plaintiff is subsequently acquired by publication, an error of the court in determining the status of the property, or its liability, or the validity of the attachment, can, it seems to us, no more affect the jurisdiction, under a statute like ours, than an erroneous decision as to the amount of plaintiff's demand, or any other error in the case: *Van Fleet*, Coll. Attack, §§ 257, 838; *Paul v. Smith*, 82 Ky. 451; *Barelli v. Wagner*, 5 Tex. Civ. App. 445 (27 S. W. 17); *Thompson v. Eastburn*, 16 N. J. Law, 100; *Diehl v. Page*, 3 N. J. Eq. 143.

5. There is much conflict in the authorities generally as to whether the statutory prerequisites to the issuance of writs of attachment are jurisdictional, and must affirmatively appear to protect the proceedings from collateral attack, or whether, in the absence of any showing in the record to the contrary, it will be presumed that the steps necessary to vest the court with jurisdiction were taken. Mr. Waples states with apparent confidence that all the statutory requirements are jurisdictional, and are not to be presumed after judgment, even on a collateral attack, and cites a large number of cases

which more or less directly support the text (Waples, Attach. § 625); while Mr. Works, with equal confidence, says that, while there are authorities holding that such proceedings are special, and that no presumptions in favor of the jurisdiction of the court can be indulged, "the clear weight of authority and reason is to the contrary" (Works, Courts & Jur. p. 547); and this seems to be the view of Judge Van Fleet, as will be seen by reference to the citation from his work on Collateral Attack, already made. An examination of the cases cited, however, will show that they are based largely, if not entirely, upon the peculiar provisions of the statute under consideration by the court, and it is therefore practically impossible to deduce from them any general rule upon the subject; and it is unnecessary for us in this case to attempt to do so, for, as we have already intimated, the necessity for an attachment, in the first instance, in an action brought in this state against a non-resident, is the outgrowth entirely of a decision of the Supreme Court of the United States, and not of any statute law or decision of this state; and we therefore feel justified in following the adjudications of that court to the effect, as we understand them, that the judgment of a superior court against a nonresident cannot be attacked collaterally for any defect in the attachment proceedings, where such proceedings are not made, by statute, jurisdictional, unless the record affirmatively shows a want of jurisdiction.

In the leading case of *Galpin v. Page*, 85 U. S. (18 Wall.) 350, in which it is held that, where a judgment of a superior court relating to a matter falling within the general scope of its powers is produced, jurisdiction will be presumed in the absence of an affirmative showing to the contrary, but if, in rendering the judgment, the court was not proceeding according to the course of

the common law, or the judgment is against a nonresident who was not personally served within the territorial limits of the court, and did not appear in the action, the authority for its rendition must appear upon the face of the record, Mr. Justice FIELD says (page 371): "The qualification here made, that the special powers conferred are not exercised according to the course of the common law, is important. When the special powers conferred are brought into action according to the course of that law—that is, in the usual form of common-law and chancery proceedings—by regular process and personal service, where a personal judgment or decree is asked, or by seizure or attachment of the property where a judgment *in rem* is sought, the same presumption of jurisdiction will usually attend the judgments of the court as in cases falling within its general powers."

And this principle was applied in the case of *Voorhees v. Jackson*, 35 U. S. (10 Pet.) 449, in which the validity of certain proceedings in attachment against a nonresident were called in question collaterally on the ground that the record of the court in which the proceedings were had did not show that an affidavit for an attachment had been made and filed with the clerk before the writ issued, or that notice of the issuing of the attachment had been given by publication, or that the defendant had been called at three different terms of court, and the default recorded, or that the auditors had waited till the expiration of twelve months from the return of the writ before making the sale; all of which were specially required in the act regulating the proceedings under attachment. Now, that was a case of a proceeding *in rem*, without jurisdiction over the person, where the record produced failed to disclose that certain provisions of the statute material for the protection of the defend-

ant's rights had been complied with, and it was argued by counsel there, as here, that all of these requirements were conditions precedent, which must not only be performed before the court had power to order a sale, but that such performance must appear in the record; but the court, in reply to this argument, said: "The provisions of the law do not prescribe what shall be deemed evidence that such acts have been done, or direct that their performance shall appear on the record. * * *

We do not think it necessary to examine the record in the attachment for evidence that the acts alleged to have been omitted appear therein to have been done. Assuming the contrary to have been the case, the merits of the present controversy are narrowed to the single question whether this omission invalidates the sale. The several courts of common pleas of Ohio, at the time of these proceedings, were courts of general jurisdiction, to which was added, by the act of 1805, power to issue writs of attachment, and order a sale of the property attached, on certain conditions. No objection, therefore, can be made to their jurisdiction over the case, the cause of action, or the property attached. * * *

There is no principle of law better settled than that every act of a court of competent jurisdiction shall be presumed to have been rightly done till the contrary appears. * * *

If the defendants' objections can be sustained, it will be on the ground that this judgment is false; and that the order of sale was not executed according to law, because the evidence of its execution is not of record. The same reason would equally apply to the nonresidence of the defendant within the state, the existence of the debt due the plaintiff, or any other creditor, which is the basis on which the whole proceedings rest."

Again, in *Cooper v. Reynolds*, 77 U. S. (10 Wall.) 308,

where a defect in an affidavit for a writ of attachment, as well as the premature issuing of the writ, was set up to defeat the title to land sold under a judgment in an action against nonresidents who had been served with summons by publication, it was held that jurisdiction of the *res* was attained by the levy of the writ, and that the errors and irregularities pointed out were of no avail on a collateral attack. Mr. Justice MILLER, after discussing the essential principles underlying the jurisdiction of the courts in proceedings by attachment against nonresidents who are not served with process within the territorial limits of the courts, and do not appear in the action, says : "Now, in this class of cases, on what does the jurisdiction of the court depend? It seems to us that the seizure of the property, or that which, in this case, is the same in effect, the levy of the writ of attachment on it, is the one essential requisite to jurisdiction, as it unquestionably is in proceedings purely *in rem*. Without this the court can proceed no further; with it the court can proceed to subject that property to the demand of plaintiff. If the writ of attachment is the lawful writ of the court, issued in proper form under the seal of the court, and if it is by the proper officer levied upon property liable to the attachment, when such a writ is returned into court the power of the court over the *res* is established. The affidavit is the preliminary to issuing the writ. It may be a defective affidavit, or possibly the officer whose duty it is to issue the writ may have failed in some manner to observe all the requisite formalities; but, the writ being issued and levied, the affidavit has served its purpose, and, though a revisory court might see in some such departure from the strict direction of the statute sufficient error to reverse the judgment, we are unable to see how that can deprive the court of the jurisdiction acquired by the writ levied upon defendant's property."

This case has been often quoted and approved by the supreme court, and is said in *Matthews v. Densmore*, 109 U. S. 216, 219 (3 Sup. Ct. 126), to be conclusive in regard to the validity of such proceedings when collaterally assailed. To the same effect, see *Harvey v. Tyler*, 69 U. S. (2 Wall.) 328; *Ludlow v. Ramsey*, 78 U. S. (11 Wall.) 581; *Grignon's Lessee v. Astor*, 43 U. S. (2 How.) 319.

6. The result of these cases is that the objection that it does not affirmatively appear that a summons was issued in the action brought by the plaintiff against the Richardsons in Multnomah County at or before the issuance of the writ of attachment, is of no avail in this suit.

7. It is next claimed that no valid attachments in such actions were made, and for that reason the court did not acquire jurisdiction of the *res*, and, therefore, had no power or authority to proceed against the defendants on a service of summons by publication. The statute (Hill's Ann. Laws, § 149) provides that: "Real property shall be attached by leaving with the occupant thereof, or, if there be no occupant, in a conspicuous place thereon, a copy of the writ certified by the sheriff;" and the return of the sheriff on the writs of attachment in question is that he executed the same on a certain date, "in Monroe Precinct, Benton County, Oregon, by posting a copy of said writ of attachment, prepared and certified to by me, as sheriff of said county, in a conspicuous place on the following described property [being the property in controversy], there being no occupant thereof on the premises." The contention for the defendants is that this return is insufficient, because it does not show the particular place where the copy of the writ was posted, or that the property was attached as the property of the defendants in the action, or that the premises were not in fact occupied at the time the at-

tempted levy was made, or that it was made by leaving a copy of the writ in a conspicuous place on the premises. Where, as in case of the location of a public highway, provision is made by statute for acquiring jurisdiction of the person by notices posted in a public or conspicuous place, it is probably necessary that the proof of posting show the particular places where the notices were posted, so that the court can say whether it was a public place or not. But in case of an officer serving a writ of attachment there is a natural presumption in favor of the discharge of official duty, and when he is required to post a notice in a conspicuous place, and certifies that he has done so, his certificate is sufficient, when questioned collaterally, without pointing out the particular place where the notice was posted: *Waples*, Attachm. § 334; *Porter v. Pico*, 55 Cal. 165; *Davis v. Baker*, 72 Cal. 494 (14 Pac. 102); *Lewis v. Quinker*, 2 Metc. (Ky.) 284; *Anderson v. Sutton*, 2 Duv. (Ky.) 480; *Head v. Daniels*, 38 Kan. 1, 10 (15 Pac. 911); *Hall v. Stevenson*, 19 Or. 153 (20 Am. St. Rep. 803, 23 Pac. 887), is not in conflict with this proposition, because—First, it was not a collateral attack; and, second, the return of the sheriff was held insufficient because it did not show that the person to whom the copy of the writ was delivered was an occupant of the premises sought to be attached, or that the place where it was posted was a conspicuous place on the premises. There is no holding or intimation in the opinion that when a sheriff levies upon real property by leaving a notice in a conspicuous place thereon his return must show the particular place where he left the copy of the writ, or that it would not be sufficient in such a return for him to certify that he left it in a conspicuous place.

8. Again, it is claimed that the return under consideration is insufficient because it does not state that the

land attached was the property of the defendants in the writ. There is some apparent conflict in the authorities as to the effect of the omission of such a statement from an officer's return on a writ of attachment, and some of the earlier cases hold that it would be fatal to the attachment; but the decided weight of authority, as well as reason, seems to be that such a statement is not necessary to its validity, or to the jurisdiction of the court over the *res*, the presumption being that the officer obeyed the mandates of his writ, and, when he returned it with a certificate that in pursuance thereof he attached certain property, it is to be presumed that it belonged to the defendants in the writ, because he had no authority to attach the property of any one else: Drake, *Attachm.* §§ 207, 208; Waples, *Attachm.* § 314.

9. The claim is also made that the return does not show that the premises were unoccupied at the time they were attached. The statute requires an attachment of real property to be made by leaving with the occupant, if there be one, a copy of the writ, and, if not, by leaving it in a conspicuous place thereon. The language of the return under consideration is that there was "no occupant thereof on the premises" when the writ was served, and counsel argues that this is, in effect, a statement that the premises were actually occupied, but the occupant was temporarily absent at the time of the officer's visit. In view of the presumptions which always come to the aid of an imperfect or indefinite return of an officer, the construction of the return given by counsel is, in our opinion, untenable.

10. But, if it is sound, there is authority for holding that under the statute a valid attachment of real property may be made by leaving a copy of the writ in a conspicuous place thereon, if the officer, at the time of visiting

the land for the purpose of attaching it, cannot find any one visibly occupying the same: *Davis v. Baker*, 72 Cal. 494 (14 Pac. 102).

11. Another objection to the sufficiency of the attachment is that the sheriff certifies that he made it by "posting" a copy of the writ in a conspicuous place on the premises, while the statute provides that real property shall be attached by "leaving" a copy of the writ in such a place. But, in our opinion, when an officer certifies that in the discharge of a duty requiring him to leave a copy of a writ or other paper he performed such duty by posting the writ or paper, it is but reasonable to conclude in a collateral proceeding that he left it so posted, and thus complied with the requirements of the statute: *Lewis v. Quinker*, 2 Metc. (Ky.) 284, 287. In support of the position of counsel, we are cited to *Lewis v. Botkin*, 4 W. Va. 533, and to *Matteson v. Smith*, 37 Wis. 333; *Hall v. Graham*, 49 Wis. 553 (5 N. W. 943), and *Wilkinson v. Bayley*, 71 Wis. 131 (36 N. W. 836). These cases are not only direct attacks made in an appellate court upon the return of an officer, but they are based upon statutes entirely different from ours, and the decisions are expressly put upon the peculiar wordings of the statute. Thus, for example, in *Lewis v. Botkin*, the statute requires the officer to "leave a copy posted at the front door of the place of abode of the defendant," and he returned that service was made by "posting an office copy hereof on the front door." On a motion to quash, the return was held insufficient because it must be presumed that the legislature meant something more than mere posting by requiring the copy to be left posted, and that, in view of this provision of the statute, it could be true that the officer posted the copy, and yet not be true that he left it posted; but the court did not hold that, in the absence of such a statutory require-

ment, a court might not reasonably conclude from the certificate of an officer that he posted a notice at a certain place that he left it so posted. The Wisconsin cases are based upon either a rule of court having the force and effect of a statute, or of a statute requiring proof of service to show that a copy of the summons was left with the defendant, as well as delivered to him; and therefore it was held on appeal that a return which did not so state was insufficient.

12. It is next claimed that the orders for publication of the summons in the actions brought against the Richardsons are void because (1) the affidavits upon which they are based did not tend to show that any diligence had been used to find the defendants in this state, or that they, or either of them, had property therein; (2) no legal proof was made that the defendants could not be served in Multnomah County; and (3) the orders for publication do not direct that a copy of the summons and complaint be deposited in the postoffice, as required by Section 57, Hill's Ann. Laws, "forthwith." The affidavits for publication, after reciting the facts constituting plaintiff's cause of action, allege the commencement of the actions, the filing of the necessary affidavits and bonds for writs of attachment, the issuance thereof, and that "the same was, on the twenty-second day of April, 1894, duly executed by levying upon, and the attachment of, certain real estate of the defendants in Benton County, Oregon; that said attachment has not been dissolved or discharged; that the defendants are, and each of them is, a nonresident of the State of Oregon, and are, and each of them is, a resident of the State of Washington; and they are now, and each of them now is, without the State of Oregon, and cannot be found within said state, even after diligent search; and affiant therefore avers that personal service of summons cannot be

made upon defendants, or either of them, within the State of Oregon." Under the ruling in *Pike v. Kennedy*, 15 Or. 420 (15 Pac. 637), these averments are sufficient to sustain the order for publication on a collateral attack. In the case referred to the affidavit stated that the defendants, to secure the payment of a promissory note, executed a mortgage on certain real property in the City of Portland, Multnomah County, Oregon, and this was held a sufficient allegation that they did have property within the state. In the case at bar the statement is that certain real property of the defendants in Benton County, Oregon, had been theretofore attached, and this is obviously a more positive showing that defendants have property in the state than the one held good in *Pike v. Kennedy*.

13. So, also, in the latter case, it was averred that personal service could not be made upon the defendants in this state, for the reason that they had departed therefrom, "and now reside at Walla Walla, in the Territory of Washington," which was not absolutely inconsistent with their actually being within the state at the time; while in the affidavits under consideration the statement is that the defendants not only reside in the State of Washington, but there is a positive statement that at the time of making the affidavits they were not within the State of Oregon, and in this regard the showing is also more positive than the affidavit in *Pike v. Kennedy*.

14. Again, it is claimed that a valid order for service by publication can be made only after a summons has been placed in the hands of the sheriff, and returned, "Not found." But we find no such provision in the statute. It provides (section 56) that when service of the summons cannot be made as prescribed in the last preceding section, "and the defendant, after due diligence, cannot be found within the state, and when that

fact appears by affidavit to the satisfaction of the court or judge thereof, * * * and it also appears that a cause of action exists against the defendant, or that he is a proper party to an action relating to real property in this state,—the court or judge * * * shall grant an order that the service be made by publication of a summons” in certain designated cases. This section provides when service may be made by publication, and how the necessary jurisdictional facts for an order to that effect shall be made to appear. It does not provide that before making the order it shall appear from the return of the sheriff that the defendant cannot be found, but that it shall so appear by affidavit to the satisfaction of the court or judge thereof; and, when the requisite facts thus appear, the court has jurisdiction to make the order: *Goodale v. Coffee*, 24 Or. 346, 354 (33 Pac. 990). The method of service by publication is statutory, and it is sufficient when the requirements of the statute, whatever they are, have been complied with. It is claimed by counsel, however, that the only legal evidence of the fact that service of the summons cannot be made as provided “in the last preceding section” is a return of the sheriff to that effect. In support of this contention he cites Section 59, Hill’s Ann. Laws, which provides “Whenever it shall appear by the return of the sheriff, his deputy, or the person appointed to serve the summons, that the defendant is not found, the plaintiff may deliver another summons to be served, and so on until service be had; or the plaintiff may proceed by publication as in this title provided, at his election.” But, as we view it, this section has no bearing whatever on the question under consideration. It simply gives to the plaintiff the right to issue an *alias* summons, or proceed by publication, as he may elect, whenever it appears by the return of the sheriff or deputy that the defendant is

not found; but it does not undertake to provide what the method of procedure shall be in case the plaintiff elects to proceed by publication. That is elsewhere provided in the statute.

15. The next objection is that, although the order for publication of the summons directs that a copy of the complaint and summons be deposited in the post-office, addressed to the defendants at their place of residence, it does not order such deposit to be made "forthwith," as the statute (section 57) requires. The omission of the word "forthwith" from such an order, although required by the statute, is not regarded, on collateral attack, as fatal to the proceedings, when it appears that the copies were in fact mailed within a reasonable time after the date of the order: *Lyon v. Comstock*, 9 Iowa, 306; *Anderson v. Goff*, 72 Cal. 65 (1 Am. St. Rep. 34, 13 Pac. 73).

16. It is claimed, however, that the deposit in this case was not so made. The order for publication is dated July 13, and the publication was had in the first issue thereafter of the newspaper in which it was directed to be made,—on the twentieth,—and copies of the complaint and summons mailed to the defendants on the same day; and, in our opinion, this was a substantial compliance with the requirements of the statute, and was not such a delay as to oust the court of the jurisdiction otherwise rightfully obtained. The object to be accomplished by such a deposit in the postoffice, where the residence of the defendant is known, is to give him such notice, in connection with the publication itself, as will inform him that the suit is pending, so that he may have an opportunity to appear and defend, if he so desires; and this purpose is served, it seems to us, when the deposit is made in the postoffice as early as the first

publication, if such publication itself is made within a reasonable time after the date of the order.

17. It is also claimed that the proof of publication and of the mailing is insufficient to sustain the judgment because (1) such proof is not attached to or indorsed on the original summons; (2) the deposit in the postoffice was not made by the sheriff or his deputy, or by a person specially appointed by him or the court, but by an unofficial person; and the affidavit in proof of such deposit does not show that a copy of the summons required to be published was deposited, or that such copy was certified to. But these objections are each without merit. There is no principle of law rendering a judgment invalid on collateral attack simply because the proof of service of the summons is not annexed to or indorsed on the summons itself.

18. Nor are we advised of any provision of the statute which requires the proof of a deposit of the complaint and summons in the postoffice, in pursuance of an order for service by publication, to be made by the sheriff or his deputy, or a person specially appointed for that purpose, or that the copy of the summons so deposited should be certified to by any one. Section 54 of the statute designates the person by whom service of the summons shall be made when the defendant is found in the state, but it has no reference, as we interpret it, to the method of service by publication. In the latter case the law requires a copy of the complaint and summons to be deposited in the postoffice, directed to the defendant, if his residence is known to the party making the application, or can with reasonable diligence be ascertained (section 57); but there is no provision that such deposit shall be made by any particular officer or person, and, in our opinion, it is sufficient if made by any adult

person competent to make the required proof thereof, except, probably, the party himself.

19. It is also insisted that the judgment is void because the original summons does not appear in the judgment roll. But there is likewise no merit in this objection. The proof of publication, as well as the findings and recitals in the judgment of the court, shows that such a summons was, in fact, issued, and its omission from the judgment roll is, therefore, of no consequence at this time.

20. And, finally, it is contended that the judgments upon which this suit was brought are void because the attached property had been transferred by the Richardsons to their co-defendants before the commencement of the several actions at law, and hence it is claimed that they had no interest therein which could be seized on attachment, and so the court did not obtain jurisdiction to render any judgment whatever. A sufficient answer to this position is that the complaint in this suit avers that such transfer was made for the purpose of defrauding creditors, and as to the plaintiff it is, therefore, only an apparent, and not a real transfer. As to it, the land still belonged to the fraudulent grantor, and was as much subject to attachment as though the fraudulent deed had never been made: *Waples*, Attachm. § 249; *Mulock v. Wilson*, 19 Colo. 296 (35 Pac. 532); *Keene v. Sallenbach*, 15 Neb. 200 (18 N. W. 75); *Williams v. Michenor*, 11 N. J. Eq. 520; *Greenway v. Thomas*, 14 Ill. 271; *Dewey v. Eckert*, 62 Ill. 218.

Having thus disposed of the numerous objections to the validity of the judgments upon which this suit is based, the only remaining question is one of fact to be determined from the testimony. The court below found that the conveyance from the Richardsons to their minor children was fraudulent and void as to the plaintiff, and

this conclusion is, in our opinion, fully supported by the testimony. It is unnecessary to state the facts disclosed by the evidence in detail. It is sufficient that at and prior to the time of the conveyance in question the defendants Richardson were indebted to the plaintiff in the aggregate sum of more than \$8,000, and to other parties in large sums, and were wholly insolvent; that before the date of the conveyance they were called upon by plaintiff to either pay or secure the indebtedness due it, and several conferences had been had between them and the officers of the bank in regard to the matter, during which the question of securing the indebtedness by a mortgage on the Oregon land was considered. While these negotiations were in progress, and while the bank was relying upon their honesty and good faith, they secretly conveyed their personal property in Washington to one of their hired men, a part of the stated consideration being wages alleged to be due him, took his note for the balance, and transferred it to one of their creditors; and also conveyed the Oregon land to their three minor children, the eldest of whom was at the time eighteen years of age, and the youngest ten, for the evident purpose, as we read the testimony, of preventing its seizure by their creditors.

It is true, the answer alleges, and the defendants A. C. and Laura R. Richardson undertook to claim, that the conveyance was made to their children in payment and satisfaction of a debt due them. The evidence which they offer in support of this defense is that in 1881 they received from the grandmother of the children three hogs of uncertain pedigree, but of the alleged value of \$500, in trust under an agreement to care for them, and to account to the children for their increase, and the product thereof, whenever the grandmother should call upon them to do so; that at or about the time of the

conveyance in question they were called upon to render an account of their trust, and upon such accounting it was found they were indebted to their children in the sum of \$10,415.66, and upon demand of the grandmother the conveyance was made in payment thereof. When it is remembered that this conveyance was made at a time when the defendants were insolvent, were being pressed by their creditors, and that the evidence discloses that the property received from the children's grandmother, if any, was used, managed, controlled, handled, and disposed of by the Richardsons at their pleasure; that no account whatever was kept in reference thereto, and no witness in the case has been able to give even approximately the several items going to make up the aggregate sum of \$10,000; and the further fact that one of the grantees in the conveyance was not born until after the creation of such alleged trust,—it will be apparent that this defense, and the evidence in support of it, do not appeal very strongly to a court of equity.

21. The conveyance, and the circumstances under which it was made, bear the semblance of an attempt to cover up the property, and it was, therefore, the defendant's duty to show that it was made in good faith, and for a valuable consideration. Under such circumstances the defendants ought to be able to point out definitely the various items going to make up the alleged indebtedness. As said by Mr. Justice THAYER in *Marks v. Crow*, 14 Or. 382 (13 Pac. 55): "Any other rule, where property has been shifted from one member of a family to another, and creditors left unprovided for, would lead to the most flagrant frauds. The creditors could not show that the indebtedness claimed to be the consideration of the transfer did not exist. They could do no more than to inquire when and under what circumstances it was created; and, unless the recipient of the property

could give a clear and precise account of the items constituting it, they should have the right to ask the court to infer that it was a sham and pretense; otherwise property might be put beyond the reach of creditors with impunity." Fraudulent intent is a question of fact, but it is agreed that it may be inferred from the facts and circumstances surrounding the transaction. It sometimes—and often, indeed—happens that the surrounding circumstances quite as satisfactorily explain the true inwardness of the transaction, and import knowledge of its object or of the intended fraud, as any other character of testimony. It follows that the decree of the court below must be affirmed, and it is so ordered.

AFFIRMED.

Decided 27 March; rehearing denied 24 April, 1899.

MCCORNACK v. SALEM RAILWAY COMPANY.

[56 Pac. 1022.]

INSOLVENCY—PREFERRED CLAIM—OPERATING EXPENSE.*—A claim for the purchase price of apparatus and appliances furnished to a street railway company which enhanced the value of its property, but were not necessary to keep the enterprise a going concern, is not entitled, after the appointment of a receiver for the company, to a preference over a prior mortgage. The test of preferability is the actual necessity for the article furnished; if the mortgaged property could not be safely used without it, there is a preference for its price, otherwise not.

IDEM—BACK CLAIMS.—A receiver appointed in a suit to foreclose a mortgage on the property of a corporation who is directed to take into his possession and control all its property, and to pay all current expenses incident to the administration of his trust, and to the condition and operation of the business of the corporation from time to time as it arises and accrues, is not thereby required to pay a claim which accrued prior to his appointment, and which is not entitled to preference over the mortgage creditors.

*NOTE.—With the case of *Green v. Coast Line R. R. Co.*, 54 Am. St. Rep. at pp. 400-493, is a monograph entitled "Claims Which Take Precedence Over Mortgages of Railways and Like Property."

On the point of allowing preferential payment of Operating Expenses and Back Claims, see 54 Am. St. Rep. pp. 405-413, and as to Construction Claims, Machinery, etc., see pp. 415-418, 420.

For a presentation of the applicability of this rule to Private Corporations, see 54 Am. St. Rep. p. 432.

As to whether Judgments for Personal Injuries recovered against a corpora-

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37	330
34	543
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44	374

From Marion : HENRY H. HEWITT, Judge.

Suit by E. P. McCornack, trustee, against the Salem Consolidated Street Railway Company to foreclose a mortgage, in which A. R. Heintz & Co. intervened. The defendant, the Salem Consolidated Street Railway Company, is a corporation organized under the laws of Oregon, for the purpose, among others, of operating a street railway, and of supplying light and electric power through and by means of electrical appliances. Having made default in the payment of its indebtedness to plaintiff, suit was instituted to foreclose the mortgage given on its entire property to secure the same, and on December 4, 1895, F. R. Anson was appointed receiver of said property. On May 6, 1896, A. R. Heintz & Co., by leave of the court, intervened and filed their petition, wherein, after showing the existence of plaintiff's mortgage and the execution of a prior mortgage to the Northwest Loan & Trust Company, both for the security of *bona fide* indebtedness, it is alleged, in substance, that on January 17, 1894, the petitioners entered into a contract with the railway company, in pursuance of which they furnished it with two Armstrong heaters, purifiers and condensers complete, and one water tank; that, on May 19, 1894, they entered into a modified agreement touching the same matter, whereby, after reciting, among other things, that whereas, it had been guaranteed that the use of such apparatus and appliances would result in a saving of \$135 per month in fuel required for the operation of the railway company's plant, and after trial thereof it had been demonstrated that the use of the same saved only

tion prior to the appointment of a receiver at the instance of unpaid mortgagees will take precedence over the mortgage, see *St. Louis Trust Co. v. Riley*, 30 L. R. A. 456 (70 Fed. 32, 16 C. C. A. 610) and *Green v. Coast Line R. R. Co.*, 33 L. R. A. 803, 54 Am. St. Rep. at pp. 425-429.—REPORTER.

\$30 per month, it was agreed that the railway company should pay to said Heintz & Co., in full settlement for such apparatus, the sum of \$33.33 per month, until \$800, the contract price therefor, was fully paid, the first payment to be made May 26, 1894; that payments were made in pursuance of such agreement to and inclusive of April 26, 1895, but none others, and that there was then due the sum of \$330.30; and that, pursuant to its terms, another payment would fall due March 17, 1896, and a like sum on the seventeenth day of April, 1896. It is further averred that the apparatus so furnished has greatly increased the value of the mortgaged property, and thereby added to the security of the mortgagees; that the amount of saving to the railway company by the use of such appliances and apparatus is and was greater than the sum mentioned in the contract, and that the sum now due the petitioners as aforesaid has been actually earned by the employment of said apparatus; that the mortgages, and each of them, were made with the view of the continued operation of said street railway company in the ordinary course of business, and that said company has continuously employed said apparatus in the operation of its road and plant; that at the time of the appointment of the receiver the roadbed and other equipment of the railway company were in poor and depreciated condition; that the receiver has since expended from the current earnings of said company, in permanent improvements and betterments, placing new poles for electric wires, and laying new ties and rails, the sum of \$3,000; that said improvements and betterments, and said expenditures therefor, were necessary to the continued and safe operation of said street railway lines, and those portions of said railway equipment so improved are now, by reason thereof, in good, serviceable, and complete condition; and that, by reason of the premises,

petitioners have and are entitled to a prior equitable lien upon all the property of the said railway company, prior in right to the lien of said mortgages, or either of them, which in equity and justice should be fully paid and discharged in preference to the payment of said mortgages. A demurrer was interposed by the plaintiff, on the ground that the petition does not state facts sufficient upon which to base the relief sought, which, being sustained, and a decree dismissing the petition entered, Heintz & Co. appeal.

AFFIRMED.

For appellant there was a brief over the name of *Whalley & Muir*, with an oral argument by *Mr. William T. Muir*.

For respondent there was a brief and an oral argument by *Mr. George G. Bingham*.

MR. CHIEF JUSTICE WOLVERTON, after stating the facts, delivered the opinion.

We assume at the outset, as it seems to have been conceded by the parties to this controversy, that defendant corporation and its mortgagees holding liens upon its franchises and property, are subject to rules and regulations like those governing the management, control, and disposal of the property and assets of companies and corporations engaged in the operation of ordinary railroads, with *quasi* public functions to perform. It has become a settled principle under the authorities that where a mortgage is taken upon the property, and even upon the earnings, of such a corporation it is implied, from the nature of the business in which the concern is engaged, and the usual and ordinary management and conduct of such business, that the current earnings of

the enterprise shall be first applied to the payment of the current operating expenses, such as for labor and supplies, and for necessary equipments and improvements of the mortgaged property, and that the balance only, usually termed the "net earnings," shall be applied in payment of the mortgage indebtedness. In the language of Chief Justice WAITE, in *Fosdick v. Schall*, 99 U. S. 235, 252, "every railroad mortgagee, in accepting his security, impliedly agrees that the current debts made in the ordinary course of business shall be paid from the current receipts before he has any claim upon the income." This doctrine rests upon the ground that the maintenance of the road and the prosecution of its business are essential to the preservation of the mortgage security. The primary object is to keep the enterprise a going concern, from considerations of both public and private interest. Its application is concisely stated by THAYER, Circuit Judge, in *Central Trust Co. v. Clark*, 26 C. C. A. 397 (81 Fed. 269). He says: "In a suit brought to foreclose a mortgage lien upon the property of a *quasi* public corporation, it is competent for a court of equity to award a preference to a claim for property supplied or services rendered to such corporation, when it appears that the property so supplied or the services rendered were necessary to enable the company to discharge its public obligations and remain a going concern, and when it is evident that the property or services in question enhanced the value of the mortgaged property, and thereby inured to the benefit of the mortgagees." The management of such a concern, whether in the hands of its promoters or in those of a receiver, is charged with the duty of so marshaling the funds arising from current earnings as to apply them in accordance with the relative equities of the preferred creditors and the mortgagee; and if, through regard for mere conven-

ience, something is taken from the fund and paid to the mortgage creditor, when as of right it belongs to and should have been paid to the preferred creditor, it is not considered inequitable, unless the claim has become stale, to require that the preferred creditor shall be paid from the future current receipts, or from the proceeds of the sale of the mortgaged property. SIMONTON, Circuit Judge, in *Southern Ry. Co. v. Carnegie Steel Co.*, 22 C. C. A. 289 (76 Fed. 492), pertinently states the rule as follows: "If, through inadvertence, or by intention, or from any other cause, any portion of the earnings has been applied to interest or dividends, or to the permanent improvement of or addition to the property, leaving unpaid debts incurred for things necessary to keep it a going concern, this is a diversion which the court, while aiding the mortgage creditor, will first correct." *

It is from considerations of this nature that the courts are induced to require, as a condition of the appointment of a receiver, that the mortgagee shall consent to the payment of such equitable demands as are outstanding against the company, which have accrued within a reasonable space of time prior to the receivership, and, even in cases where the condition is not primarily imposed, to require that the receiver shall adjust the current receipt fund in accordance with the equities thus to be ascertained, and, under certain conditions, reimburse the preferred creditor from the *corpus* of the estate, and to that extent displace the mortgage. In further support of these observations, see *Bound v. South Carolina Ry. Co.*, 7 C. C. A. 322, 58 Fed. 473; *National Bank of Augusta v. Carolina, K. & W. R. Co.*, 63 Fed. 25; *Thomas*

*NOTE.—This case has now been affirmed on appeal, and claim of the Steel Company given a preference: *Southern Ry. Co. v. Carnegie Steel Co.*, 175 U. S. — (20 Sup. Ct. Rep. 347). See also, on the same point, *Lackawanna Iron Co. v. Farmers' Loan Co.*, 175 U. S. — (20 Sup. Ct. Rep. 363), and *Maryland Steel Co. v. Gettysburg Electric Ry. Co.*, 99 Fed. Rep. 150.—REPORTER.

v. *Peoria, etc. Ry. Co.*, 36 Fed. 808; *Wood v. New York & N. E. R. R. Co.*, 70 Fed. 741; *Hale v. Frost*, 99 U. S. 389; *Miltenberger v. Logansport R. R. Co.*, 106 U. S. 286 (1 Sup. Ct. 140); *Thomas v. Western Car Co.*, 149 U. S. 95 (13 Sup. Ct. 824). It is often a difficult matter to determine what are preferred claims and what are not, depending to a large extent upon the particular circumstances of each case. According to Chief Justice WAITE they must be such as have accrued for "necessary operating and managing expenses, proper equipment, and useful improvements." *Fosdick v. Schall*, 99 U. S. 235. It is clear from the authorities, however, that claims cannot be included which may arise on account of additional equipments provided, and valuable and lasting improvements made: *Smith*, Rec. §§ 342, 343; *Williamson's Admr. v. W. C. etc. R. R. Co.*, 33 Gratt. 624. As an illustration of the requisites which should attend the preferred claim, we will refer again to the case of *Central Trust Co. v. Clark*, 26 C. C. A. 397, 81 Fed. 269. It is there said: "The gear wheel which was supplied by the Midvale Steel Company to the mortgagor company was an important and essential part of its plant, without which the railway company could neither discharge its duties to the public nor realize an income by the use of the mortgaged property. It was necessary for the railway company to purchase a new gear wheel and pinion, in order that its cable road might be kept in operation, and that the company might preserve its franchises and remain a going concern. The machinery in question enhanced the value of the mortgaged property by as much as such machinery was fairly worth in the market." In no sense can such claims be extended to the inclusion of those of general creditors: *Kneeland v. American Loan Co.*, 136 U. S. 89 (10 Sup. Ct. 950); *Burnham v. Bowen*, 111 U. S. 776 (4 Sup. Ct. 675).

Measured by the understanding thus to be gathered touching the nature of the claims or demands which are entitled to preference over the mortgage, we will consider whether the petitioners' claim falls within the category. The apparatus and appliances furnished did not constitute an adjunct requisite or necessary to keep the enterprise a going concern. They were at first engrafted as an experiment, but, by design of both parties to the contract, were finally constituted a new and additional improvement. This improvement, it is true, added to and enhanced the value of the mortgage security; but, in so far as it is shown by the petition, the allegation as to its necessity, under the rule, either in the interest of the public or the mortgagees, is entirely wanting. The enterprise was a going concern before such improvement, and would have so continued without it. In support of their claim the petitioners allege that since the appointment of the receiver \$3,000 have been expended out of the current earnings, in payment of improvements and betterments; but we find from the petition that such improvements consisted in placing new poles for electric wires, laying new ties and rails, etc., which were clearly necessary for putting the road into such condition that it might be safely operated. The expense thus incurred was, therefore, properly paid out of such current earnings. But such outlay furnishes no criterion in dealing with the petitioners' claim, for the reason that it was not for necessary appliances and improvements; nor does the allegation that the agreed consideration had been actually earned by the use and employment of the apparatus relieve the petitioners from showing the necessity for the expenditure, under the rule. The demurrer was properly sustained, and the decree of the court below will therefore be affirmed.*

AFFIRMED.

ON MOTION FOR REHEARING.

MR. CHIEF JUSTICE WOLVERTON delivered the opinion.

The appellants ask for a rehearing of this cause, and in support of the petition therefor direct special attention to the point made in their brief, to the effect that the order appointing the receiver having directed that he should take into his possession and control all the property of the defendant corporation, "including all franchises of the said defendant company and evidences thereof, as, also, all contracts entered into or owned and possessed by said company," and having further directed him to pay "all current expenses incident to the administration of his trust, and to the condition and operation of said business of the defendant company, from time to time, as the same arises and accrues," he was thereby required to pay the particular claim and demand of the appellants; and it is suggested that perhaps we had overlooked it in the consideration of the cause. The contention did not escape our attention, and is practically, or inferentially at least, covered by the opinion. It was there held that the claim or demand in question was not such a preferred claim as was entitled to payment in preference to the mortgage lien. The terms of the order, when read in their entirety, do not require the payment of any claims which had accrued prior to the appointment of such receiver, but such current expenses only as are incident to the administration of his trust and to the condition and operation of the business. So that we find nothing in the order which requires the receiver to pay any debt or obligation of the company not entitled to preference over the mortgage creditors. For these reasons, the petition for rehearing will be denied.

REHEARING DENIED.

Argued 20 March; decided 24 April, 1899.

KIRKWOOD v. FORD.

[56 Pac. 411.]

1. COUNTY BOARD OF EQUALIZATION—POWER TO ASSESS.—A county board of equalization may assess property taxable in its county omitted by the assessor from the roll, and fix a valuation thereon, under Hill's Ann. Laws, §§ 2773, 2779, without other notice than the general one given by the assessor of the meeting of the board to correct and equalize the assessment roll.
2. REMISSION OF TAXES BY SHERIFF.—The sheriff is not authorized under Hill's Ann. Laws, § 2832, to remit taxes where the assessment has been made by the board of equalization instead of the assessor: *Steel v. Fell*, 29 Or. 272, applied.
3. ESTOPPEL TO CLAIM REMISSION OF TAXES.—A taxpayer who personally appears before the board of equalization and makes oath that she is the owner and holder of certain property, is not entitled to have the taxes thereon remitted on her bare subsequent affidavit that she is not the owner.

From Washington: THOS. A. McBRIDE, Judge.

Application for mandamus by Janet Kirkwood against H. P. Ford, Sheriff. From an order dismissing the writ, plaintiff appeals.

AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. Samuel B. Huston*.

For respondent there was a brief over the name of *Loring K. Adams*, with an oral argument by *Mr. N. W. Barrett*.

MR. CHIEF JUSTICE WOLVERTON delivered the opinion.

This is a proceeding by mandamus to compel the Sheriff of Washington County to remit the taxes assessed against the plaintiff upon certain mortgages, as authorized by Section 2832, Hill's Ann. Laws.* It appears that the

*Section 2832. "Whenever the assessor, through mistake or otherwise, shall return as taxable property a greater amount than should be assessed to any person, the sheriff may remit the excess upon the person owning such property, or his agent, making affidavit that the same was wrongfully assessed, * * * and report the same." * * * —REPORTER.

plaintiff was assessed in 1895 by the assessor of said county upon real, but not upon personal, property, which assessment was returned in due time to the board of equalization. She was thereupon cited to appear before the board, and show cause why she should not be assessed upon certain notes, and, in pursuance thereof, appeared in person on September 28, 1895, and admitted under oath that she was the owner of notes aggregating \$10,680, which the board caused to be assessed to her at \$8,000. Subsequently, on March 21, 1896, plaintiff presented an affidavit to the sheriff, setting forth a list of all the property which she claimed to own liable to taxation, and alleging that the assessor had, by mistake or otherwise, returned as taxable property belonging to her the said notes, valued at \$8,000, when in truth and in fact she was not the owner thereof, and that the same were wrongfully assessed to her. The plaintiff's demand for a remission of the taxes thereon having been refused, she sued out a writ of mandamus to compel compliance on the part of the sheriff. The sheriff, in his return to the alternative writ, set up the facts touching the plaintiff's citation and appearance before the board of equalization, her admission under oath that she was the owner of such notes and mortgages securing the same, its consequent assessment of the property to her, and that such assessment is the one complained of. The lower court found the allegations of the return to be true, and entered judgment dismissing the writ, from which plaintiff appeals.

1. The contention of plaintiff is that the directions of section 2832 are mandatory, and that, when any person shows by affidavit that he or she has been wrongfully assessed upon property not belonging to such person, the sheriff has no alternative but to remit the taxes, and report his action to the county court for credit upon his

account. It will be noted that the section relates to the correction of mistakes of the assessor; but the board of equalization may also assess property, taxable in its county, which that officer has omitted from the roll, and fix a valuation thereon; and this it may do without notice, other than the general notice given by the assessor of the meeting of the board for the purpose of correcting and equalizing the assessment roll: *Hill's Ann. Laws*, §§ 2778, 2779*; *Oregon & Washington Mortgage Savings Bank v. Jordan*, 16 Or. 113 (17 Pac. 621); *Oregon & California R. R. Co. v. Lane County*, 23 Or. 386 (31 Pac. 964); *Ramp v. Marion County*, 24 Or. 461 (33 Pac. 681).

2. The board is given much larger powers than the assessor, being invested with revisory jurisdiction, so that the act of the board cannot be deemed in any sense to be the act of the assessor. A strict construction should be given said section 2832 (as was intimated in *Steel v. Fell*, 29 Or. 272, 45 Pac. 794), and this precludes the sheriff from all authority to remit the taxes where the assessment has been made, as here, by the board of equalization.

3. There is yet another reason why plaintiff should not be permitted to prosecute the writ. She personally appeared before the board of equalization, and made oath to the effect that she was the owner and holder of the property in question. She thereby became instrumental in causing the board to assess it to her; and this fact alone was sufficient to preclude her from procuring a remission by the sheriff of the taxes on such property, upon her bare affidavit that she was not the owner thereof.

AFFIRMED.

*Section 2778: "The county judge, county clerk, and assessor constitute a board of equalization."

Section 2779: "If it shall appear to such board of equalization that there are any lands or property * * * not assessed, said board shall make the proper corrections."—REPORTER.

Decided 8 April, 1899.

COCHRAN v. BAKER.

[52 Pac. 520; 56 Pac. 641.]

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42	398
34	555
43	314
43	625
43	628
34	555
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1. **REMITTITUR—POWER OF SUPREME COURT TO CORRECT JUDGMENT.**—Where there is an erroneous judgment at law entered on undisputed facts, the supreme court may remand the case with directions to enter a particular judgment, as was done in *Merchants' National Bank v. Pope*, 19 Or. 35, and *Nodine v. Shirley*, 24 Or. 250; or, if a judgment is manifestly excessive, by an inspection of the record, and the amount thereof is apparent, the court may affirm the judgment on penalty of a new trial, unless the excess is remitted, as in the case of *More v. Ladd*, 29 Or. 523.
2. **UNAUTHORIZED CONTRACT BY AGENT—LIABILITY—FORM OF ACTION.**—An agent who makes a contract on behalf of his principal in excess of his authority is, on the repudiation of the contract by the principal, liable thereon, though he made no false representations as to his authority, since he impliedly warranted that he was empowered to make the contract. The action will be in contract rather than in tort.
3. **RELEASE OF SURETY BY PREMATURE PAYMENT.**—The payment of an installment on a building contract in advance of the time provided by the contract discharges the surety on the contractor's bond against mechanics' liens only to the extent of such payment.
4. **MECHANIC'S LIENS—NONLIENABLE ITEMS.**—A mechanic's lien is not void *in toto* because the statement of account on which it is based included nonlienable items, where they were included without improper motives, and were small in amount, and capable of being segregated.
5. **EVIDENCE—ADMISSIONS IN OFFER OF COMPROMISE.**—Admissions of a party, not made when a compromise was under consideration, are admissible against him.

From Marion: GEORGE H. BURNETT, Judge.

Action by P. A. Cochran, F. A. Ford, and J. H. Mack, against J. E. Baker, to recover damages for the breach of an implied warranty of authority to sign a certain bond. Defendant appeals from a judgment against him. Before the final hearing respondents moved for permission to correct a mistake in the judgment, and offered to remit an excess that had been inadvertently entered in their favor.

MOTION OVERRULED. JUDGMENT MODIFIED.

Decided 14 March, 1898.

ON MOTION TO CORRECT RECORD.

This is an offer by plaintiffs to remit the excess of their judgment over and above the amount demanded, viz., the sum of \$115.81, and a motion for leave to apply to the court below to correct a mistake in its record, which it is insisted was inadvertently made.

Mr. A. C. Hough for the motion.

Messrs. J. A. Carson and D. C. Sherman, contra.

PER CURIAM. 1. It is generally conceded that a trial court at all times possesses inherent power to amend its judgments, orders, and decrees by a *nunc pro tunc* entry, so as to cause them to conform to the proceedings had therein, and make them speak the truth, provided no rights of third persons have intervened, and such correction can be made by a mere inspection of the record, or by reference to some memorandum of the trial, made at the hearing thereof by the court, or from the pleadings on file, without resorting to evidence *aliunde*: Elliott, App. Proc. § 209; 1 Black, Judgm. § 155; 1 Freeman, Judgm. § 71; *Douglas County Road Co. v. Douglas County*, 5 Or. 406; *Harvey's Heirs v. Wait*, 10 Or. 117; *Ladd v. Mason*, 10 Or. 308; *Carter v. Koshland*, 12 Or. 492 (8 Pac. 556); *Nicklin v. Robertson*, 28 Or. 278 (42 Pac. 993, 52 Am. St. Rep. 790). While in some instances it has been held that a trial court loses all jurisdiction over its judgment when an appeal therefrom has been perfected, numerous respectable authorities can be cited in support of the doctrine that such court, notwithstanding the appeal, retains plenary power over the record of its judg-

ments and decrees, and may correct it in the manner indicated: 2 Enc. Pl. & Prac. 231, and notes; Elliott, App. Proc. § 541; 1 Black, Judgm. § 162, and cases cited. But, if it be conceded that the trial court possesses such power, there is no necessity, in the case at bar, of any action on its part; for if the cause was referred to a referee, who took the testimony and made findings of fact and law therefrom which were approved by the court, or if the action were tried by the court without the intervention of a jury, resulting in an erroneous judgment in law, and there is no dispute as to the facts, this court has power to modify the judgment complained of, and, having done so, may remand the cause to the lower court, with directions to enter a particular judgment instead of ordering a new trial: Elliott, App. Proc. §§ 564, 567; *Merchants' National Bank v. Pope*, 19 Or. 35 (26 Pac. 622); *Nodine v. Shirley*, 24 Or. 250 (33 Pac. 379). So, too, if it is manifest that an excessive judgment has been rendered, which is predicated upon an erroneous verdict, and this court, from an inspection of the record, is able to segregate the excess from the amount so found by the jury, it may, on condition that the respondent remits the excess, affirm the judgment for the balance; otherwise a new trial will be ordered. Elliott, App. Proc. § 570; *Mackey v. Olssen*, 12 Or. 429 (8 Pac. 357); *Fiore v. Ladd*, 29 Or. 528 (46 Pac. 144). The excess of the judgment being ascertainable from an inspection of the pleadings, this court is competent to make the proper correction, without ordering a new trial; but, inasmuch as other alleged errors are assigned in the notice of appeal, a trial of the cause upon the merits will be necessary, in view of which we have concluded to deny the motion, with leave to reargue it upon such trial; and it is so ordered.

MOTION OVERRULED.

Decided 8 April, 1899.

ON THE MERITS.

This is an action to recover damages for the wrongful and unauthoritative use of the name of another as surety in the execution of a bond conditioned for the faithful performance of a building contract on the part of the principals. The complaint states, in substance, that on or about March 28, 1894, plaintiffs entered into an agreement with Plummer & Ault, contractors, whereby the said contractors agreed, for the consideration of \$4,745, to furnish the necessary labor and materials, and to build and complete, by July 15, 1894, a one-story brick block, in accordance with designated specifications, and to save plaintiffs harmless from all liens thereon; the consideration to be paid in installments, the last of which, amounting to \$745, to be paid thirty days after the final acceptance of the structure by the owners. It is also alleged that at the same time the said Plummer & Ault executed and delivered to plaintiffs their bond in the penal sum of \$4,745, purporting to be signed by one J. C. Goodale as surety, and conditioned that, if the said Plummer & Ault should construct and complete said block in all respects according to said contract and specifications, and not permit any person or persons to obtain any lien thereon for labor or materials furnished, then the said bond to be null and void; otherwise to remain in full force and effect, and be liable to enforcement to the extent of all damages which might be sustained by reason of the failure of the said Plummer & Ault to comply with their obligations under said contract; and that, in case said plaintiffs should be held or required to pay for any labor or materials done or furnished to said

Plummer & Ault in the construction of said block, said Plummer & Ault and said Goodale should repay the same to plaintiffs. It is further alleged that before the delivery of said bond Plummer & Ault presented the same to J. E. Baker, the defendant, and that he thereupon wrongfully and unlawfully, and without authority therefor, and without the knowledge or consent of said plaintiffs, or either of them, subscribed the name of J. C. Goodale as surety thereto, and that Plummer & Ault thereupon delivered said bond to plaintiffs, who, relying upon the financial responsibility of the said Goodale, and believing his name subscribed to said bond, as aforesaid, to be his true and genuine signature, accepted the same; that, upon the faith thereof, plaintiffs paid to Plummer & Ault at different times during the construction of said block, and before its completion, various sums, aggregating \$4,576.29, to be applied upon the contract price; that at the time of the completion of the said block, and before the plaintiffs took possession, there was due and owing to material men and laborers on liens duly filed thereon the sum of \$1,387.67; that the said Goodale repudiated and denied the execution of the bond, and plaintiffs were compelled to and did pay all of said liens, amounting to \$1,218.96 in excess of the contract price, for which latter sum they demand judgment as damages.

The answer puts in issue the allegations touching the wrongful and unlawful subscribing of Goodale's name by the defendant to the bond in question, the default on the part of Plummer & Ault, and the payment of the lien claims for labor and material. As a further defense it is averred, in effect, that on or about August 8, 1894, the defendant notified plaintiffs that there were certain claims for liens existing against said premises, and requested plaintiffs to withhold further payments; that, in addition thereto, plaintiffs had knowledge that other

claims for labor and material furnished to said contractors were then unpaid, but that, in utter disregard of said notice, they refused and neglected to withhold the payment of moneys to become due, and made payments to said contractors long before the same became due and payable; that the money so paid was not used in payment for labor or materials employed in the construction of said block. An issue was tendered by the reply. Trial was had before the court without the intervention of a jury, and, after the plaintiffs had concluded their testimony, the defendant moved for a nonsuit for the reason that the complaint does not state sufficient facts, and that the testimony was insufficient to support the action. The motion was overruled, and, judgment having been rendered for the plaintiffs, the defendant appeals.

MODIFIED.

For appellant there was a brief over the names of *D. C. Sherman* and *John A. Carson*, with an oral argument by *Mr. Sherman*.

For respondents there was a brief over the names of *A. C. Hough* and *Geo. G. Bingham*, with an oral argument by *Mr. Bingham*.

MR. CHIEF JUSTICE WOLVERTON, after making the foregoing statement, delivered the opinion.

2. The bond in question appears upon its face to have been subscribed by Goodale in person, as there is no mark or designation to indicate that it had been done by an agent. In this condition it was presented by Plummer to the plaintiffs for their acceptance, who supposed that Goodale had in reality signed it. The testimony shows that but one of the plaintiffs had been acquainted

with Goodale prior to the date of the execution of the bond, and that all were unacquainted with the defendant; that they had no conversation, directly or indirectly, with either the defendant or Goodale, touching the matter of the execution of the bond, and no representations in any form or manner were made to them by either the defendant or Goodale regarding the manner of signing or touching the authority of defendant to act in the capacity of the agent of Goodale in the execution thereof; and, as a matter of fact, they did not discover that the bond was not signed by Goodale in person until long after its execution, and near the time plaintiffs were called upon to pay the said liens. The defendant seems to have tried the case, and now presents the same here for our consideration, upon the theory that the action is one for false representation and deceit, and claims that the plaintiffs have failed to allege in the complaint, or show by the testimony, sufficient facts to support an action of that character. The plaintiffs, however, insist that the action is not necessarily in tort, but, whether it be so denominated or not, that the facts stated in the complaint and disclosed by the record are sufficient upon which to maintain the cause. Defendant made no express representations touching his authority as agent, or, at least, none were made to the plaintiffs, either directly or indirectly, as they were entirely ignorant of the fact that Goodale's name was signed to the bond by another until long after it had been accepted by them. We may also take it for granted that defendant honestly believed he was fully authorized to execute the bond in behalf of and as the agent of Goodale in the manner in which he assumed to execute it, and that he acted in entire good faith, but erroneously, as it pertained to his authority in the premises. There can be no doubt that such a state

of facts would constitute a cause of action against the agent where parties have been damaged in reliance upon his acts, and thus far it may be said that the authorities are practically agreed. The agent, by undertaking to act for another as his principal, tacitly and impliedly represents himself to be authorized as a matter of fact to so act, and becomes liable if it appears that he assumed as true that which he did not know to be so. The reason upon which the liability is founded is that the party dealing with such a supposed agent is deprived of any remedy upon the contract against the principal. The contract, though in form that of the principal, is not his in fact, and, of course, is not susceptible of enforcement against him; and, as the loss must fall somewhere, it is but a rule of justice that it should be borne by him whose acts made it possible: *Mechem, Agency*, § 545; *Baltzen v. Nicolay*, 53 N. Y. 467; *Kroeger v. Pitcairn*, 101 Pa. St. 311 (47 Am. St. Rep. 718).

But as regards the form of action to be adopted in such a case, the authorities are somewhat in conflict. In *Jefts v. York*, 10 Cush. 392, 395, it is maintained in an opinion by Chief Justice SHAW that if a supposed agent acts without authority, but under the belief that he possessed it, and a party has advanced money without knowledge of his want of authority, he would be liable in an action on the case to an amount in damages equal to the sum advanced; and that, "if one falsely represents that he has an authority, by which another, relying on the representation, is misled, he is liable; and by acting as agent for another, when he is not, though he thinks he is, he tacitly and impliedly represents himself authorized without knowing the fact to be true, it is in the nature of a false warranty, and he is liable. But in both cases his liability is founded on the ground of deceit, and the remedy is by action of tort."

This view is seemingly concurred in and approved by *Hancock v. Yunker*, 83 Ill. 208; *Cole v. O'Brien*, 34 Neb. 68 (33 Am. St. Rep. 616, 51 N. W. 316); *McCurdy v. Rogers*, 21 Wis. 199 (91 Am. Dec. 468). Another doctrine, however, is maintained in New York, and is stated by ANDREWS, J., in *Baltzen v. Nicolay*, 53 N. Y. 467, as follows: "When an agent makes a contract beyond his authority, by which the principal is not bound by reason of the fact that it was unauthorized, the agent is liable in damages to the person dealing with him upon the faith that he possessed the authority which he assumed. The ground and form of his liability in such a case has been the subject of discussion, and there are conflicting decisions upon the point; but the later and better-considered opinions seem to be that his liability, when the contract is made in the name of his principal, rests upon an implied warranty of his authority to make it, and the remedy is by an action for its breach." This doctrine finds support in *White v. Madison*, 26 N. Y. 117; *Lewis v. Nicholson*, 18 Q. B. 502; *Noe v. Gregory*, 7 Daly, 283; *Taylor v. Nostrand*, 134 N. Y. 108 (31 N. E. 246). It is elsewhere asserted that the remedy against one who assumes to act without authority as the agent of another, and in that capacity attempts to make a contract in behalf of his supposed principal, is in the nature of an action for deceit, or upon the breach of the implied warranty of his authority, according to the facts of the particular case: 1 Am. & Eng. Enc. Law (2 ed.), 1127; *Patterson v. Lippincott*, 47 N. J. Law, 457 (1 Atl. 506). The question is a new one in this state, but we are impressed with the view that under the facts of the case at bar the plaintiffs have an action against the defendant upon his implied warranty touching his agency, and that it is one in contract, rather than in tort. The complaint concisely states the facts as they exist, and, while it does

not, in express terms, count upon a breach of warranty, yet the facts set forth lead to such a legal inference, and, under our system of pleadings, is quite sufficient to support the action : *White v. Madison*, 26 N. Y. 117. In this view neither the allegations nor proofs requisite to sustain the ordinary action in deceit, based upon false representations as claimed by defendant, are necessary to the maintenance of plaintiffs' action upon the implied warranty.

3. There is another question in the same connection which requires notice before passing. The complaint avers that plaintiffs at various times during the construction of the block, and before the completion thereof, paid the contractors various sums, aggregating \$4,576.26, being within \$168.71 of the full contract price. The defendant maintains that, in view of the condition of the contract, the last payment of \$745 should be made thirty days after the building was finally completed, it is a necessary and unavoidable deduction that the plaintiffs have violated their contract in making such payment long prior to the time fixed therefor, and have thereby released the defendant from his obligation. The proposition proceeds upon the assumption—which is proper—that the defendant should be treated as a surety for the contractors upon the bond or obligation ; to be exact, the stipulation touching the \$745 payment is that it should be made “thirty days after the building is finally accepted by the owners,” and there might be a question whether the averment negatives the condition, but this may be waived. The defendant has set up by way of further defense that payments were made long prior to the time when they became due under the terms of the contract, in utter disregard of its provisions, and without the knowledge or consent of the supposed surety. Touching this defense, there is a direct denial by the reply, thus

presenting the issue directly to the court upon the question of fact as to the time of making such payments. Upon this issue the question was tried before the court without a jury, which made findings with reference thereto, and, among others, that plaintiffs had paid, and were compelled to pay, for materials furnished and labor performed, \$1,334.77 in excess of the contract price. In this light, and looking at the question most favorably to the defendant, the payment admitted by the complaint to have been made prior to the stipulated time therefor under the contract—conceding for the present purpose that it is so admitted—could only operate as a discharge of the defendant or the surety *pro tanto*: *Foster v. Gaston*, 123 Ind. 96 (23 N. E. 1092). He was, therefore, not entitled to a nonsuit, as the amount of the premature payment was much less than that found by the court to have been paid by plaintiffs in excess of the contract price.

The defendant, conscious of this difficulty, contends it appears from the evidence that the plaintiffs utterly disregarded the terms of the contract respecting the time of making the other payments also. The strong trend of the evidence upon this question, however, shows approximate performance in accord with the agreement of the parties. Furthermore, it is elicited that defendant knew in most part the manner in which payments were being made, and to a considerable extent directed how and when they should be made; so that, in any event, it would have been manifestly improper to grant the nonsuit.

4. During the course of the trial three certain statements of account were offered and admitted in evidence, each of which contained some item or items of small moment, which it is claimed were for articles that did not go into the buildings, and were, therefore, nonlien-

able. Objection was made to the introduction of the statements on the ground that they contained such non-lienable items, and their admission is assigned as error. The objection, as we understand it, proceeds upon the ground that the inclusion of the nonlienable items rendered the liens claimed in pursuance of the statements void; but the items were of such small moment, even granting that they were nonlienable, as to preclude the idea that they were included and commingled with such as were lienable for the purpose of gaining any advantage in the transaction, and, withal, were susceptible of being segregated, and, therefore, could not be held to avoid the liens; hence the statements were properly admitted in evidence.

5. Another objection was made to the introduction of certain evidence touching admissions made by defendant during the course of a supposed compromise; but this is untenable, for the reason that it very clearly appears that at the time the admissions were made the parties were not engaged in any direct endeavor to compromise the matters in dispute.

The judgment of the court below is for \$1,334.77, which is in excess of the prayer of the complaint by \$115.81. The error was first discovered by the plaintiffs after the appeal had been taken and perfected; but immediately upon the discovery they filed in this court a showing to the effect that judgment was so entered through their inadvertence, and ask that they be allowed to file a remission of such excess. It is undeniably proper that they should be allowed to make the remission and have an affirmance, and, in accordance with former precedents, the judgment of the court below will be affirmed, if within ten days the plaintiffs shall file in this court their remission of such excess; otherwise, it will be reversed: *Mackey v. Olssen*, 12 Or. 429 (8 Pac. 357); *Fiore*

v. *Ladd*, 29 Or. 528, 535 (46 Pac. 144). If this were the only question presented upon the appeal, it would have been proper to tax the costs to respondents; but other questions were urged, upon which we may presume defendant based his entire reliance for a reversal, so that the costs should abide the usual rule.

MODIFIED.

ELWERT v. NORTON.

[51 Pac. 1097; 59 Pac. 1118.]

1. **PREMATURE APPEAL.**—Failure of the trial court to act upon a motion by the appellee to strike from the files an undertaking on appeal, for defects therein, is not available to him in the appellate court, on a claim that the appeal was prematurely taken, for Hill's Ann. Laws, § 537, Subd. 4, providing that when a party in good faith gives notice of appeal, and thereafter omits, through mistake, to do any other act, including the filing of an undertaking necessary to perfect the appeal, the trial court or the appellate court may permit an amendment or performance of such act on such terms as are just, does not confer on the trial court any jurisdiction to pass on the sufficiency of the notice of appeal, or of any other jurisdictional proceeding required to perfect the appeal, and of course there was nothing to be decided, so the appeal was not premature.
2. **APPEAL—FILING NEW BOND.**—Where a challenge to the sufficiency of an undertaking on appeal is sustained by the supreme court, it will allow appellant to file a new undertaking, without any cross motion for leave to do so; and hence a motion for leave will not be denied because it was filed after a motion to dismiss for insufficient undertaking: *Cross v. Chichester*, 4 Or. 114; *Alberson v. Mahaffey*, 6 Or. 412, and *State ex rel. v. McKinmore*, 8 Or. 207, overruled on this point.

From Multnomah: LOYAL B. STEARNS, Judge.

Suit by Chas. P. Elwert against Sarah Norton and others, in which plaintiff lost. He appealed; whereupon it was moved to dismiss his appeal. This was overruled, but on the final hearing the decree was affirmed.

MOTION OVERRULED: AFFIRMED.

ON MOTION TO DISMISS APPEAL.

Mr. Martin L. Pipes for the motion.

Mr. Dell Stuart, contra.

PER CURIAM. This is a motion to dismiss an appeal. The material facts are that on July 10, 1897, the court below dissolved an injunction theretofore issued in the cause, and dismissed the suit. From this decree plaintiff attempted to appeal, and, after serving and filing his notice thereof, filed an undertaking therefor, to which his name is appended as principal, but purported to have been signed "by J. B. Elwert, Agent," with C. A. Alisky and T. H. Liebe as sureties. Counsel for defendants excepted to the sufficiency of the sureties, and also moved to strike the undertaking from the files for the reason that it is insufficient to stay proceedings; that it does not undertake that the appellant will pay the value of the use and occupation of the property described in the decree, if the same be affirmed; and that it does not appear that J. B. Elwert had authority from appellant to subscribe his name to the undertaking, but no action was ever taken by the court upon this motion. On August 2, 1897, by stipulation of the parties, the sureties appeared before the clerk of the circuit court, and Alisky was examined on oath concerning his qualifications as such surety, and his testimony was thereupon reduced to writing, and subscribed by him. On the next day, plaintiff's counsel left with the person in charge of the office of counsel for defendants a notice to the effect that on August 9, 1897, at the hour of 10 o'clock in the forenoon, said sureties would appear at the office of said clerk for the purpose of justifying to their sufficiency;

but the proof of service does not show that defendants' counsel was absent from his office at the time the notice in question was left for him. The defendants failing to appear in person or by counsel at the time and place so appointed, Liebe, being duly sworn, testified concerning his qualification as such surety, and his examination, being reduced to writing, was subscribed by him. The clerk found that said sureties were sufficient, annexed their examinations to the undertaking, indorsed his allowance thereon, and filed the same in his office. Thereafter plaintiff filed the transcript of the cause; and, before the motion in question came on to be heard, his counsel tendered a new undertaking for the appeal, executed by the same persons, and in the same manner, as the original, which he moves may be substituted therefor.

1. Counsel for defendants insist that the motion in the court below to strike from the files the undertaking on appeal, for defects therein, and because the same is not signed by the principal, but by a person purporting to be his agent, whose authority was challenged, gave such court jurisdiction of the subject-matter, and that, the motion never having been acted upon, the court still retains jurisdiction of the cause, and hence the appeal was prematurely taken, in view of which it should be dismissed. The authority relied upon to support this contention is Subdivision 4, Section 537, Hill's Ann. Laws, which, as far as applicable, is as follows: "When a party in good faith gives due notice of an appeal from a judgment or decree, and thereafter omits, through mistake, to do any other act, including the filing of an undertaking or other act as provided in this section, necessary to perfect the appeal, or to stay proceedings, the court below or judge thereof, or the appellate court, may permit an amendment, or performance of such act, on such

terms as may be just." The argument on this point proceeds upon the theory that, if the undertaking on appeal be challenged in the court below, such court may allow the proper amendment, but, if attacked after the appellate court has acquired jurisdiction, the latter court only can allow a new undertaking to be filed. The authority of the trial court or judge to allow an act to be done that should have been performed, but was omitted through mistake, is evidently based upon a voluntary confession of the error by the party committing it, who alone can invoke the relief which the statute affords; and, such being the case, the adverse party cannot challenge, in the lower court, any act necessary to confer jurisdiction upon this court; for, if the rule were otherwise, then it would necessarily follow that the circuit court possesses the power of determining when the appellate court shall obtain jurisdiction of an appeal, to admit which would be tantamount to an abdication of jurisdiction on the part of this court. If plaintiff, in attempting to perfect his appeal, failed to pursue the provisions of the statute conferring the right, the defendants have their remedy in this court by a motion to dismiss; but as we view Subdivision 4, of Section 537, Hill's Ann. Laws, they have no right whatever to challenge in the lower court any step taken by plaintiff to perfect the appeal, and, such court having acquired no jurisdiction by the motion, no error can be predicated upon its neglect to determine the same.

2. Counsel for plaintiff, at the argument of this motion, tendered a new undertaking on appeal, and moved for leave to file the same as a substitute for the original; but it is insisted that this cross motion comes too late, because counsel for defendants had no notice thereof until their motion to dismiss came on to be

heard. It has been held that a motion for leave to file a new undertaking must be filed before the motion to dismiss is brought on for hearing (*Cross v. Chichester*, 4 Or. 112; *Alberson v. Mahaffey*, 6 Or. 412; *State ex rel. v. McKinmore*, 8 Or. 207); and, the cross motion in the case at bar not having been so filed, it is contended that it should be overruled; that appellant cannot be heard to insist that his original undertaking was executed as prescribed by statute, and at the same time offer to file a new one if it should be found deficient in any particular; and that his right to invoke the exercise of the discretionary power of the court to permit him to perform an act that he may have omitted through mistake must be predicated upon his confession that an error was committed. The approval of the rule contended for would, in our opinion, be subversive of, instead of furthering, the ends of justice. Suppose an appellant, believing he has strictly complied with all the provisions of the statute in perfecting his appeal, after giving due notice thereof, attempts in this court to maintain the principle for which he insists, and it should be determined that he had not complied with all the statutory requirements, what valid reason can be assigned for punishing him for his belief? Appeals at common law were unknown, and the right is derived from the statute, in view of which the subdivision under consideration should be treated as remedial, and receive a liberal construction. It has been the practice in this court for several years, when a challenge to the sufficiency of an undertaking has been sustained, to allow the appellant to file a new one without any cross motion therefor; and, the justice of this procedure being so apparent, we take occasion to say that the rule announced in the decisions hereinbefore cited no longer prevails. The motion to dismiss the appeal is

therefore denied, and leave granted to file the new or a substituted undertaking, if the one so tendered should be found insufficient.

MOTION OVERRULED.

ON THE MERITS.

For appellant there was a brief over the names of *Dell Stuart and Cox, Cotton, Teal & Minor*, with an oral argument by *Mr. Lewis B. Cox*.

For respondents there was a brief and an oral argument by *Messrs. Edward Mendenhall and Martin L. Pipes*.

MR. JUSTICE MOORE delivered the opinion.

This is a suit to enjoin the Sheriff of Multnomah County from selling certain real property upon execution. The facts are, that on July 6, 1894, the defendant Sarah Norton, secured a decree in the circuit court for said county against Mrs. J. B. Elwert, requiring her to remove a brick wall, and to pay the sum of \$1,750 as damages, which decree, upon appeal, was affirmed in this court: *Norton v. Elwert*, 29 Or. 583; that on March 12, 1894, Mrs. Elwert, for the expressed consideration of \$36,000, executed a deed to plaintiff purporting to convey lot 4 and the south five feet of lot 3, in block 218, in the City of Portland; that thereafter, a mandate from this court having been sent down and a decree entered in the trial court as directed therein, Mrs. Norton's attorneys filed a lien against the same for the amount of their stipulated compensation, whereupon she assigned her interest in the decree to H. D. Sanborn, who caused an execution to be issued thereon, in pursu-

ance of which the defendant George C. Sears, as sheriff of said county, levied upon said real property as that of Mrs. J. B. Elwert, to prevent the sale of which the plaintiff Charles P. Elwert, instituted this suit. Issue having been joined therein, a trial was had, and the court, finding that the deed from Mrs. Elwert to her son was executed without any consideration therefor, declared the same canceled, and ordered the sheriff to sell the property upon said execution, and, after satisfying the costs and disbursements, to pay the proceeds first to Mrs. Norton's attorneys to the extent of their liens, and the remainder to Sanborn, from which decree plaintiff appeals.

It was stipulated that the evidence taken in the case of *Mendenhall v. Elwert*, 36 Or. — (59 Pac. 805), so far as applicable, should constitute the evidence in the case at bar, and having reached the conclusion in that case that the deed of Mrs. Elwert was fraudulent, it follows that the decree is affirmed.

AFFIRMED.

Argued 11 April; decided 24 April, 1899.

COOS BAY NAVIGATION COMPANY v. ENDICOTT.

[57 Pac. 61.]

OPENING DEFAULT IS DISCRETIONARY.*—The setting aside of a default judgment is peculiarly a matter of discretion, and the fact that a successful defense has afterwards been made is a cogent reason for not disturbing the order.

SETTING ASIDE JUDGMENT.—The discretion of the trial court in setting aside a default judgment upon an application made two days after such default, will not be disturbed on appeal where it appears from the affidavits of defendant's attorney in support of the motion that the practice prevailed that, unless the time for answering expired before the beginning of the term, the cause would go over, and that the default was entered and the jury called to assess the damages pending negotiations in reference to the subject-matter of the litigation: *Thompson v. Connell*, 31 Or. 231, and *Hanthorn v. Oliver*, 32 Or. 57, cited.

*NOTE.—In 60 Am. St. Rep. 633-664, is a monograph on Vacating Judgments and Decrees on Motion When not Specially Authorized by Statute.—REPORTER.

84	573
40	420
34	573
146	307
147	84
34	573
148	439

EXPECTED ANSWER.*—Sustaining an objection to questions propounded to a witness cannot be said to be erroneous where the record does not disclose the particular facts sought to be elicited by the question: *Kelley v. Highfield*, 15 Or. 277, followed.

EVIDENCE OF ATTEMPTED COMPROMISE.—Evidence of negotiations between the parties to a suit, concerning the subject-matter of the litigation, is inadmissible where they were unable to agree: *Cochran v. Baker*, 34 Or. 555, and *Hill's Ann. Laws*, § 856.

APPEALABLE ERROR—EXCESSIVE DAMAGES.—The refusal of the trial court to set aside a verdict because of excessive damages is not reviewable: *Kumit v. Southern Pacific Co.*, 21 Or. 512, followed.

From Coos: J. C. FULLERTON, Judge.

This is an action by the Coos Bay, Roseburg and Eastern Railroad and Navigation Company against Julia M. and William W. Endicott, to appropriate land for a right of way for a railroad. The summons was served upon the defendants on the third day of May, 1894. On the twenty-second of the same month their default for want of an answer was duly entered, and on the succeeding day a jury was called, which, after hearing the testimony offered by the plaintiff, assessed the defendants' damages at the sum of \$150, the amount admitted in the complaint. On the next day defendants moved the court for permission to answer and defend, alleging that the default occurred through mistake, inadvertence, surprise, and excusable negligence; that they did not know or suppose the action would be tried at the then term of court, until the jury had been impaneled therein; that they resided about forty miles from the county seat, and did not appear in such action, because they were informed and believed that the court had made an order that, if the time for answering after service in an action did not expire by the first day of the term, it would not be tried at such term; that they were negotiating with

*NOTE.—The same rule has been enforced in the following cases: *Stanley v. Smith*, 15 Or. 505; *Tucker v. Constable*, 16 Or. 400; *State v. Gallo*, 18 Or. 425; *Craft v. Dalles City*, 21 Or. 55.—REPORTER.

plaintiff about the right of way, and supposed they could and would agree upon the compensation to be paid therefor without resorting to a trial; that \$150 is not an adequate consideration for such right of way, but that the damage to defendants' premises by reason thereof is at least the sum of \$450, which they would be able to show if allowed to defend. This motion was supported by the affidavits of the defendants' attorney, employed after the default had been entered against them, and after the jury had been impaneled, and one I. E. Rose, which set forth the facts substantially as stated in the motion. On the same day the plaintiff filed a counter affidavit, which, however, contains nothing material to any question on this appeal, except the admission that negotiations were in progress between the plaintiff and defendants, in reference to the subject-matter of the litigation at the time the default was taken. Upon the showing thus made, the court very promptly set aside the default, and permitted the defendants to answer. An answer was thereafter filed, denying that \$150, or any other or less sum than \$700, is a reasonable compensation for the damages defendants would suffer by reason of the taking of the land sought to be appropriated, and setting up, as new matter, sundry facts going to show the amount of such damages. A reply having been filed, a trial was subsequently had, resulting in a verdict in favor of the defendants for the sum of \$500, which, on a motion of the plaintiff to set aside the verdict, and for a new trial, on the ground, among others, of excessive damages, was reduced to \$350, and judgment entered accordingly. From this judgment the plaintiff appeals, assigning as error: First, the refusal of the trial court to enter judgment in its favor on the verdict of the jury rendered May 23, 1894, and in sustaining defendants' motion to set aside their default and permitting them to answer;

second, in sustaining the defendants' objections to certain questions propounded to the witness Dodge, called on behalf of the plaintiff, in reference to a conversation he had with the defendants while attempting, as an agent of the plaintiff, to negotiate with them concerning such right of way; and, third, the overruling of plaintiff's motion to set aside the verdict, and for a new trial.

AFFIRMED.

For appellant there was a brief and an oral argument by *Messrs. J. W. Bennett and S. H. Hazard.*

For respondents there was a brief over the names of *D. L. Watson, James Watson, and D. L. Watson Jr.,* with an oral argument by *Mr. David Lowry Watson.*

MR. JUSTICE BEAN, after stating the facts, delivered the opinion of the court.

It is a well settled rule that an application to set aside a default is addressed to the sound discretion of the trial court, and that its action thereon will not be disturbed on appeal, unless there is an abuse thereof, and especially so when a default has been set aside, as in this case, and a successful defense afterwards made: *City of Chicago v. Adams*, 24 Ill. 492. It is true this discretion is not an arbitrary one, but must be exercised in conformity with the spirit of the law, and in accordance with the rules established in reference thereto: *Thompson v. Connell*, 31 Or. 231 (65 Am. St. Rep. 231, 48 Pac. 467); *Hanthorn v. Oliver*, 32 Or. 57 (67 Am. St. Rep. 518, 51 Pac. 440). But as said by the Supreme Court of California in *Watson v. Railroad Co.*, 41 Cal. 20: "Each case must be determined upon its own peculiar facts, for perhaps no two cases will be found to present the same circumstances

for consideration. As a general rule, however, in cases where, as here, application is made so immediately after default entered as that no considerable delay to the plaintiff is to be occasioned by permitting a defense on the merits, the court ought to incline to relieve. The exercise of the mere discretion of the court ought to tend, in a reasonable degree, at least, to bring about a judgment on the very merits of the case; and, when the circumstances are such as to lead the court to hesitate upon the motion to open the default, it is better, as a general rule, that the doubt should be resolved in favor of the application."

While the showing made in this case was somewhat meager, and although the better practice undoubtedly is for an affidavit in support of a motion of this kind to be made by the party himself, yet, under the circumstances, we are not prepared to say that the trial court abused its discretion or exercised it erroneously. The defendants were, no doubt, negligent in not appearing within the time specified in the summons, but they were in a measure excused by the practice which seems to have prevailed, that, unless the time for answering expired before the beginning of the term, the cause would go over. In view of this fact, and the further fact that, pending negotiations in reference to the subject-matter of the litigation, the default was entered, and a jury called to assess the damages, we are of the opinion the action of the court in permitting them to defend ought not to be disturbed.

Nor was it error to sustain the objections to the questions propounded to the witness Dodge, because (1) the record does not disclose the particular facts sought to be elicited by the question (*Kelley v. Highfield*, 15 Or. 277, 14 Pac. 744); and (2) they related to a matter wholly

immaterial, and not in issue in the case, as the complaint alleged, and the answer admitted, that the parties were unable to agree.

Upon the remaining questions, it is sufficient to say that it was held in *Nelson v. Oregon Ry. & Nav. Co.*, 13 Or. 141 (9 Pac. 321), and *McQuaid v. Portland & Vancouver R. Co.*, 19 Or. 535 (25 Pac. 26), that the refusal of a trial court to set aside a verdict because of excessive damages cannot be reviewed on appeal. And as said in *Kumli v. Southern Pacific Co.*, 21 Or. 505 (28 Pac. 639): "Until these cases are overruled, they are the law of this state, and control in the determination of the questions sought to be raised in this case." The judgment from which this appeal is taken is not so excessive or disproportionate as to call for a re-examination, at this time, of the doctrines of the cases referred to. Judgment affirmed.

AFFIRMED.

Decided 20 March; rehearing decided 6 November, 1899.

SHUTE v. HINMAN.

[56 Pac. 412; 58 Pac. 882.]

1. FOLLOWING TRUST FUNDS—PREFERENCES.*—One claiming a preference over other creditors on account of trust property must identify the specific property, or its proceeds, or show that the property of the debtor which he seeks to affect with the preference includes the trust property: *Ferchen v. Arndt*, 26 Or. 121, cited.
2. IDEM.—Where a trustee deposited trust funds to his credit in his own bank, and such funds were commingled with and used as a part of the general funds of the bank, in the ordinary course of its business, so that the identity of the trust fund was wholly lost, the trust creditor is not entitled to a preference over other creditors out of money left in the bank upon an assignment by the trustee for creditors.

*NOTE.—On the same subject, see *State v. Foster*, 68 Am. St. Rep. 60, 29 L. R. A. 226, 250; *Henderson v. O'Connor*, 106 Cal. 385 (89 Pac. 786); *Little v. Chadwick*, 7 L. R. A. 570; *First National Bank v. Hummel*, 8 L. R. A. 788, 20 Am. St. Rep. 257.

—REPORTER.

From Washington : THOS. A. McBRIDE, Judge.

Proceeding by J. W. Shute, administrator, against A. Hinman, assignee. From a decree for plaintiff, defendant appeals.

REVERSED.

For appellant there was a brief and an oral argument by *Mr. Samuel B. Huston*.

For respondent there was a brief over the name of *Bagley & Brown*, with an oral argument by *Mr. Thos. H. Tongue*.

MR. JUSTICE BEAN delivered the opinion.

This is a proceeding to require the assignee of the estate of Anton Pfanner, insolvent, to pay the administrator of Martin Manning, deceased, \$879.84 out of the moneys coming into his hands as assignee, on the ground that it is a trust fund. The facts are that on February 3, 1896, Pfanner was appointed and qualified as administrator of the estate of Martin Manning, deceased, and acted as such until June, 1897, when he was removed by the county court, and the present petitioner appointed in his stead. Soon after his appointment as administrator, Pfanner purchased and assumed control of a banking house at Forest Grove; and all funds received by him belonging to the estate were deposited in the bank to his credit, and commingled with and used as a part of the general funds of the bank in the usual course of business. On June 10, 1897, the bank failed, and Pfanner made a general assignment for the benefit of his creditors. He had in the bank vault at the time the sum of \$1,755.69 in cash, and was indebted to the Manning estate in the sum of \$879.84 for

moneys collected by him as administrator. The present administrator sets out these facts in his petition, and prays an order directing the assignee to pay over such sum to him out of the funds on hand at the time of the assignment. The petition was granted, and the assignee appeals, claiming that the evidence is insufficient to establish the right of the Manning estate to a preference over the other creditors of Pfanner.

1. The rule in this state is that one claiming a preference over other creditors, on account of trust property, must either identify the specific property, or the proceeds thereof, or show that the property of the debtor which he seeks to affect with such lien or preference includes the trust property. The rule formerly prevailed that the claimant must identify the particular property or the proceeds thereof; but this has been so modified that, although its identity has been completely lost, equity will afford relief if it is shown to have been mingled into a common mass, and forms a part thereof. "This equitable doctrine is put upon the ground," says Mr. Chief Justice LORD, "that the real owner has the right to retake and reclaim his property, through all its transformations and forms, so long as it may be traced, whether its identity is preserved, or is merged into a mass of which it forms a part. To accomplish this end, when such trust property has been mingled into a mass of which it forms a part, but its identity is lost, equity affords relief by creating a charge or lien upon such mass for its ascertainable value. The right to such relief has its basis in the right of property, and 'simply asserts,' as ANDREWS, J., says, 'the right of the true owner to his own property:' *Cavin v. Gleason*, 105 N. Y. 262 (11 N. E. 504). But whether such owner seeks to recover specific property, or to create a lien upon a mass or fund, he must trace such property, and show

that it belongs to him, or that it has gone into, and then remains in, the mass which he seeks to impress with a lien or charge. In such cases the question to be determined always is whether the trust property or fund, or the proceeds thereof, is traceable into any specific property or fund. Before, therefore, one claiming to be a trust creditor can be entitled to a lien or preference over other creditors, he must make it appear that the fund or property of the debtor which he seeks to affect with such lien or preference includes the trust property, or the proceeds thereof." *Ferchen v. Arndt*, 26 Or. 121 (29 L. R. A. 664, 46 Am. St. Rep. 603, 37 Pac. 161, 163).

2. By applying this rule to the facts in the case before us, its solution presents no difficulty. The evidence shows that the money for which the plaintiff claims a preference was indiscriminately mixed and mingled with the bank's other money, and its identity wholly lost. None of it has been traced or followed into the mass sought to be charged with the lien. It was used by the bank in the ordinary course of its business to pay its debts and obligations, the same as any other money; and, so far as this record shows, none of it was in the possession of the bank at the time of its suspension, or has since come into the hands of the assignee.

This is not a case where the trustee has mingled the trust fund with his own, and a balance remains sufficient to satisfy the trust, as in *Knatchbull v. Hallett*, 13 Ch. Div. 696; but here the trust fund was commingled with the other funds of the bank, the same as that of other depositors, and was paid out and disbursed in the same manner. It is manifest, therefore, that the petitioner has no preference over other creditors. The decree must therefore be reversed, and the petition dismissed; and it is so ordered.

REVERSED.

6 November, 1899.

ON REHEARING.

MR. JUSTICE MOORE delivered the opinion.

A rehearing having been granted in this cause, it is insisted that, inasmuch as the testimony conclusively shows that Pfanner placed the \$879.84, belonging to the Manning estate in his bank, and thereafter, until the assignment, retained more than that amount therein, it was error in the former opinion, in speaking of the money which was sought to be impressed with a preference, to say that "none of it has been traced or followed into the mass sought to be charged with the lien." Pfanner, as a witness, says, in substance, that when appointed administrator he was a broker, and kept the funds of the estate in his safe, but when he went into the banking business they were placed in his bank, and that most of his collections as administrator were made after he engaged in the latter business. In speaking of the manner in which the money of the estate was deposited, he says, "It was placed with the bank's money, the same as any other money." If Pfanner had continued in the business of a broker, and kept the funds of the estate in his safe, but commingled with his own, it is quite probable that if, at the time of the assignment, the money therein was sufficient to satisfy the demands of his trust, a court of equity, upon proper application, would have enforced a lien thereon in favor of the *cestui que* trust. So, too, as intimated in the former opinion, if, after having mixed the money of the estate with his own, Pfanner had made a general deposit thereof in a bank, where it remained at the time of the assignment, a court of equity would undoubtedly have impressed the money

with a lien in favor of the estate: *Overseers of Poor of Norfolk v. Bank of Virginia*, 2 Gratt. 544 (44 Am. Dec. 399); *Stair v. New York Nat. Bank*, 55 Pa. St. 364 (93 Am. Dec. 759); *Van Allen v. Bank*, 52 N. Y. 1; *Central Nat. Bank v. Connecticut Mut. Life Ins. Co.*, 104 U. S. 54. This rule is founded upon the principle that if a trustee mingles with his own money the funds of his *cestui que trust*, the whole will be regarded as belonging to the latter, except so far as the trustee may be able to distinguish his own: *Hart v. Ten Eyck*, 2 Johns, Ch. 62, 108.

It has been held, by invoking the presumption that the ordinary course of business has been followed (Hill's Ann. Laws, § 776, Subd. 20), that, in the absence of evidence to the contrary, a deposit of money in a bank will be regarded as a general deposit (*Alston v. State*, 92 Ala. 124, 13 L. R. A. 659, 9 South. 732). However, there exists no necessity, in the case at bar, for invoking this presumption, for the testimony conclusively shows that Pfanner made a general deposit of the money of the estate in the bank. This created the relation of creditor and debtor between him and the bank, thereby giving it the right to mingle the money so deposited with its own funds: *Morse, Banks*, § 289; *Cadwell v. King*, 84 Iowa, 228 (50 N. W. 975); *Catlin v. Bank*, 7 Conn. 487; *Coffin v. Anderson*, 4 Blackf. 395; *Horwitz v. Ellinger*, 31 Md. 492; *Carman v. Bank*, 61 Md. 467; *Marine Bank v. Fulton Bank*, 69 U. S. (2 Wall.) 252; *Thompson v. Riggs*, 72 U. S. (5 Wall.) 663; *Bank v. Millard*, 77 U. S. (10 Wall.) 152. Although the bank may have retained in its vaults at all times a sum greater than the trust funds, a general deposit thereof was technically a use of such funds in its business: *St. Paul Trust Co. v. Kittson*, 62 Minn. 408 (65 N. W. 74). In *Otis v. Gross*, 96 Ill. 612 (36 Am. Rep. 157), a clerk of a court having made a

general deposit of trust funds in a bank which became insolvent, sought to impress the money of the bank in the hands of a receiver with a preferential lien, but the relief was denied, the court holding that he must share *pro rata* with the other creditors of the bank. In *Wetherell v. O'Brien*, 140 Ill. 146 (33 Am. St. Rep. 221, 29 N. E. 904), an executor made a general deposit of the funds of his testator in a bank which subsequently failed, and in a suit to impress with an equitable lien the money of the bank in the possession of its assignee it was held that the suit would not lie; the court saying: "It is clear that it was impossible, when the assignment was made, to identify the money of the appellee as a separate trust fund, distinct from the other moneys of the bank."

In *McLain v. Wallace*, 103 Ind. 562 (5 N. E. 911), a clerk of a court, having made a general deposit of trust funds in a bank in his own name, to which he appended the word "clerk," sought to establish a lien on the money of the bank in the hands of its receiver; but it was held that the word "clerk" did not make the deposit a special one, and that the suit would not lie, the court saying: "Deposits in bank are either general or special. Upon a special deposit the bank is merely a bailee, and is bound according to the terms of the special deposit; but on a general deposit, without special agreement, the money becomes the property of the bank, and the depositor has no longer any claim on that money. His claim is on the bank for a like amount of money: *Coffin v. Anderson*, 4 Blackf. 395; *McEwen v. Davis*, 39 Ind. 109. Upon the insolvency of a bank, its general depositors must be paid *pro rata*." In *Fletcher v. Sharpe*, 108 Ind. 276 (9 N. E. 142), an administrator having made a general deposit of the funds of his intestate in a bank, which subsequently became insolvent, it was held, in a suit to sub-

ject the money of the bank to an equitable lien, that he was not entitled to any preference over the other general depositors.

The reason for this rule is found in the fact that upon a general deposit of money in a bank it becomes the property of the latter, and, when indiscriminately mixed and mingled with the other money of the bank which becomes insolvent, its identity is wholly lost when any portion of it is checked out, in which case it is impossible to trace the fund into the hands of the bank's assignee. The fact that Pfanner the administrator and Pfanner the banker were one and the same person, so that the bank must have known the character of the funds so deposited, affords no reason for changing the rule that a general deposit cannot be impressed with a trust after the bank in which it is placed has made a general assignment: *Shields v. Thomas*, 71 Miss. 260 (42 Am. St. Rep. 458, 14 South. 84). Having discovered no error in the former opinion, we are compelled to adhere therein.

REVERSED.

Argued 27 March; decided 24 April, 1899.

LOOMIS v. ROSENTHAL.

[57 Pac. 55.]

LIMITATION OF ACTIONS—LACHES—EQUITY.—While the statute of limitations is not a defense in equity, still the claimant must have exercised reasonable diligence in asserting his claim after ascertaining the fraud complained of, or after learning of facts which would put a person of ordinary intelligence on inquiry: *Raymond v. Flavel*, 27 Or. 219, and *Sedlak v. Sedlak*, 14 Or. 540, cited.

LACHES—STALE DEMAND.—The purchaser of land at an administrator's sale held notorious and exclusive possession of it nineteen years, and fifteen years after the youngest heir became of age. The heirs lived in the same neighborhood, knew their father had owned the land, and visited the purchaser's family, and were notified of the administrator's sale. The purchaser cut the timber, erected costly buildings, and contributed a large sum towards bringing an electric railway from the city to the premises, and the land rapidly increased in value. The deeds showing the transactions were of record. *Held*, that the heirs were guilty of laches preventing their recovery of the land, notwithstanding no notice of the appointment of the administrator was served on them.

From Multnomah: LOYAL B. STEARNS, Judge.

This is a suit by Katie J. Loomis and Olive F. Swafford against Lewis and Caroline Rosenthal to establish a trust in real property, to set aside certain conveyances thereof, and to recover the rents and profits arising therefrom. The material facts are that on February 21, 1860, one J. V. Clary, being the owner in fee simple of the north-west $\frac{1}{4}$ of section 33, in township 1 north, of range 2 east of the Willamette Meridian, in Multnomah County, executed with his wife, Barbara A., a mortgage thereof to Messrs. Ladd & Tilton, bankers, to secure the payment of the sum of \$300, payable six months from that date, with interest thereon, after maturity, at the rate of five per cent. per month, which was duly recorded in the records of mortgages of said county. Clary and his wife having moved off the premises, the latter, on October 21, 1861, for the expressed consideration of \$135, executed to the defendant Lewis Rosenthal what purported to be a bargain and sale deed thereof, in pursuance of which he moved thereon in 1862, remaining in possession only a few months, but returned thereto in 1865, since which time he has been constantly in the possession thereof. J. V. Clary died intestate March 12, 1862, leaving the said Barbara A., now the wife of H. C. Baugher, and three daughters, who, since the death of their father, have married, and whose names and date of birth are as follows: Olive Swafford, May 15, 1856; Lola Lane, April 16, 1859; and Katie J. Loomis, February 6, 1861,—who still survive. Rosenthal and wife, on November 3, 1863, executed to one H. F. Bloch a mortgage of said land to secure the payment of a promissory note, purporting to have been executed May 12, 1862, for the sum of \$1,500, with interest thereon at the rate of two per cent. per month, and Ladd & Tilton exe-

cuted to Bloch, on November 5, 1863, an assignment of the said Clary mortgage, and the same was recorded in the records of mortgages of said county.

On April 6, 1871, Rosenthal and wife, for the expressed consideration of \$800, executed to one B. Goldsmith a quitclaim deed of said land, reciting therein that the interest intended to be conveyed thereby was the dower right of Barbara A. Clary. Rosenthal, having been appointed administrator of the estate of J. V. Clary, deceased, obtained an order of the county court of said county, in pursuance of which he, on March 18, 1871, sold said land for the sum of \$1,800 to Bloch, and, said sale having been confirmed by an order of the county court, the administrator, on April 14, 1871, executed to the purchaser a deed to the premises. Bloch and wife, on April 18, 1871, for the expressed consideration of \$1,800, executed a quitclaim deed to Goldsmith, who, with his wife, on April 26, 1876, in consideration of \$1, conveyed said premises by a like deed to Rosenthal. The tax levied upon said land for the year 1873 becoming delinquent, the premises were sold to satisfy the same to one William Barnes, who, on September 18, 1890, conveyed to Rosenthal all the interest that he thereby acquired. Barbara A. Baugher and Lola Lane having conveyed their respective interests in said premises to Katie J. Loomis, she, with her sister Olive Swafford, instituted this suit, alleging in their complaint the facts, in substance, as hereinbefore detailed, and that Rosenthal, as a part of the consideration for Barbara A. Clary's deed, agreed to satisfy the Ladd & Tilton mortgage, but that he neglected to do so, and, in order to defraud the heirs of J. V. Clary, procured said mortgage to be assigned to Bloch, to be held in trust for him; that he secured the appointment of administrator of Clary's estate, and had Bloch present said mortgage as a claim

against the estate, and, notwithstanding the statute of limitations had run against the lien, he allowed the claim, amounting to the sum of \$1,800; and that each of said deeds was executed in pursuance of a plan whereby the several grantees held the title to said real property in trust for Rosenthal, who, without having been discharged as administrator, caused said premises to be conveyed to him, seeking thereby to defraud the *cestuis que trustent* of their estate therein; and that the reasonable value of the rent of said land for a period of six years immediately preceding the commencement of this suit is \$6,000.

As an excuse for the delay in commencing this suit it is averred as follows: "That the plaintiffs and said Lola Lane during said times were minors, and wholly unacquainted with the business affairs of their father's estate, and without any knowledge that he had left an estate for them, or that they were entitled thereto; and they knew nothing of the said fraudulent acts and conduct of the defendant Lewis Rosenthal, or of his fraudulent intent and purpose towards them; that the said defendant carefully concealed all of his said acts and conduct from them, and covered up his fraudulent purpose and intent by deeds and proceedings of record which appeared to be regular on their face, and which diverted all suspicion from said defendant, and were intended by him to be, and were, misleading; and the plaintiffs and said Lola Lane were without any knowledge or any information of said fraudulent acts, purpose, and intent of said defendant until on or about the first day of September, 1891, when they were informed thereof by their attorneys; that up to said time they were totally ignorant of all said fraudulent acts and conduct by the defendant, and of his intent to defraud them, and were without means of knowledge or information respecting the same; that,

as soon as they were informed thereof, they began legal proceedings against said defendant Lewis Rosenthal in the Circuit Court of the United States for the District of Oregon, which they prosecuted to final trial, but their bill of complaint was dismissed on the twenty-seventh day of March, 1895, by said court, because said court found and held that the plaintiff Kate J. Loomis was a resident of the State of Oregon when said cause was commenced." The defendants, having denied the material allegations of the complaint, averred that all said conveyances were executed and said probate proceedings were had in good faith; that Bloch purchased said land at the administrator's sale thereof for himself, and that there never was any agreement or understanding, directly or indirectly, either before, at, or after said sale, whereby the title to said land should be held in trust for the defendants, or either of them; and that Rosenthal, for more than fifteen years prior to the commencement of this suit, had been in the open, notorious, continuous, adverse possession of all of said land, claiming to own the same in his own right; that he had cleared said land, set out orchards and erected buildings thereon, and contributed the sum of \$5,000 towards the construction of an electric railway from the City of Portland thereto. The reply having put in issue the allegations of new matter contained in the answer, a trial was had, and from the evidence taken before a referee the court found the facts in substance as hereinbefore stated, and as alleged in the answer, and that the plaintiffs had been guilty of gross laches in the commencement of their suit, and that they had not established any facts tending to justify such long delay, and thereupon dismissed the suit, and plaintiffs appeal.

AFFIRMED.

For appellants there was a brief over the name of *Thayer & St. Rayner*, with an oral argument by *Mr. Henry St. Rayner* and *Mrs. Mary Leonard*.

For respondents there was a brief over the names of *Dolph, Mallory & Simon, McDougall & Jones*, and *Snow & McCamant*, with an oral argument by *Mr. Joseph Simon* and *Mr. Wallace M. McCamant*.

MR. JUSTICE MOORE, after making the foregoing statement of the facts, delivered the opinion of the court.

It is contended by plaintiffs' counsel that the petition for the appointment of an administrator of the estate of J. V. Clary, deceased, did not state facts sufficient to confer upon the County Court of Multnomah County jurisdiction of the subject-matter; that Clary's heirs were not served with a citation to appear, and show why their ancestor's real property should not be sold to satisfy his debts, and hence said court never acquired jurisdiction of their persons, in consequence of which it was powerless to order a sale of the premises, thereby rendering any attempted sale thereof void. Defendants' counsel maintain, however, that, inasmuch as the complaint nowhere charges that Rosenthal was improperly appointed administrator, the question sought to be presented is not in issue; that, if it were conceded that such sale was void,—which is denied,—the plaintiffs were never divested of their legal estate in the premises, and their proper remedy would have been an action in ejectment, but, having commenced a suit in equity to have Rosenthal declared a trustee, who, by reason of the alleged fraudulent sale of the premises as administrator to himself, holds the title to the land in trust for them, they thereby admit the jurisdiction of the county court,

and the legality of its proceedings in the matter of said estate, and the sale of said property, and hence are precluded from questioning such proceedings. The argument adduced by defendants' counsel seems logically to support the legal principle for which they contend, but we do not deem it necessary to a decision of the case to consider the questions thus presented by either party, for, if Rosenthal, as administrator, conveyed the premises to any person under an agreement or understanding that the latter would hold the legal title thereto in trust for him, in pursuance of which the land was thereafter conveyed to him, a court of equity would not permit him to take advantage of his own wrong, but would treat him as a trustee for the heirs, whom he had tried to defraud. If, however, Rosenthal, as such administrator, made a *bona fide* sale of the land to Bloch, and thereafter, in good faith, purchased it in his individual capacity, obtaining a deed therefor, in pursuance of which he made valuable improvements thereon, and has been in the open, notorious, and adverse possession thereof, to plaintiffs' knowledge of their rights, for such a period of time as to render it inequitable to restore the land to them, the deed which Rosenthal obtained being a colorable title to the whole premises, the jurisdiction of the county court and the legality of its proceedings, so far as the administrator's sale is concerned, would be rendered wholly immaterial.

The fraud charged in the complaint as a basis for the relief demanded is that Rosenthal bought the land from Mrs Clary under an agreement to pay off the Ladd & Tilton mortgage; that, instead of keeping his engagement in this respect, he procured the mortgage to be assigned to Bloch, who undertook to enforce it for his benefit; and, being the equitable owner of this mortgage, he fraudulently sought and secured the appoint-

ment as administrator of Clary's estate, in pursuance of which he sold the land to Bloch, who held the title thereto in trust for him. Mrs. Baugher, as a witness for plaintiffs, in speaking of what her brother-in-law said to her about Rosenthal's alleged agreement to procure the discharge of the lien upon the premises, says: "Mr. Kerns told me at the time of the sale that he would pay the mortgage off, and pay me a little besides; and I got \$135, I think." Mrs. Rebecca Wells, formerly Mrs. Kerns, in speaking upon this subject, says: "As I remember, Mr. Rosenthal met my husband, and told him he wanted to get his property or Mrs. Clary's. Mr. Kerns then wrote to Mrs. Clary. When she came down, they talked it over at our house, and my understanding was that Mr. Rosenthal was to pay off the mortgage that was on the place, and was to pay her a certain amount of money, if she would sign away her dower, or whatever right she had in the place." Rosenthal testifies that he never agreed to pay off the mortgage, and that he did not know of its existence until informed thereof by Bloch some time after 1865. It will be observed that the testimony of Mrs. Baugher and of Mrs. Wells relating to Rosenthal's alleged agreement is wholly hearsay, and refers exclusively to what Mr. Kerns said to his wife and her sister concerning the purchase price of the land. The evidence tends to show that when Rosenthal secured Mrs. Clary's deed the land in question was covered with heavy timber, except about three or four acres, which was partially cleared, and a small board house built thereon; that at the time vacant school land in the vicinity, of equal or greater value, could have been obtained by any citizen of the State of Oregon for the sum of \$1.25 per acre, and that Rosenthal paid the full value of the land. The books of Ladd & Tilton in relation to the mortgage loan, being offered in evidence, show that on February

21, 1860, J. V. Clary executed to the bank a note, No. 284, for which a credit is claimed on account of cash in the sum of \$277.98, and on March 1, 1860, the bank is charged, on account of bills receivable, with note No. 284 in the sum of \$300. The books also show the following payments on account of said note: June 9, 1862, \$10; August 9—probably the same year—\$7.98; and November 3, 1863, \$260, in full payment thereof. It is fairly inferable from an inspection of these books that, since Clary's note did not provide for the payment of any interest until after maturity, six months' interest thereon was deducted from the face of the note, and that the maker received the remainder, which was \$277.98, the amount charged to cash on account of said note. The books of the bank also show that it received this sum only in full settlement of the note, thus conclusively showing that no interest whatever was paid thereon, notwithstanding the note, at the time it was surrendered to Bloch, amounted to the sum of \$678. If the land, in 1863, had been worth more than \$277.98, and the costs and expenses of the mortgage foreclosure and the sale of the premises thereunder, it is not at all reasonable to suppose that the bank would have assigned the note for the amount received, and thereby lost the interest on the money loaned for the term of three years, eight months, and twelve days.

During this period of time the country about Portland probably improved somewhat, in consequence of which the value of this tract, together with all other lands in the vicinity of that city, must necessarily have appreciated in some degree; and it is a circumstance tending to show that the land was not probably worth as much at the time Rosenthal secured Mrs. Clary's deed as it was when the note and mortgage were assigned to Bloch.

Nor is this inference dispelled because Ladd & Tilton loaned that amount of money upon the land in question, for the evidence shows that Clary at that time owned another tract of land in the same neighborhood. It is very evident, we think, that Rosenthal never agreed, as a part of the consideration for Mrs. Clary's deed, to pay off the Ladd & Tilton mortgage. He testifies that he understood Mrs. Clary, at the time he obtained her deed, was a widow, which led him to believe that she thereby conveyed her dower right in the premises, and he is corroborated in this respect by the testimony of Mrs. Wells, hereinbefore quoted, and also by the recital contained in his deed of April 6, 1871, executed to Goldsmith. Rosenthal having exchanged a yoke of oxen and a span of horses with Mrs. Clary for her interest in the land, his wife testifies that he gave this stock for a house on the place; thus showing, it would seem, that, while Rosenthal obtained no title whatever by reason of Mrs. Clary's being a married woman, he expected to receive an estate in the land for her life. That Rosenthal never undertook to discharge the Ladd & Tilton mortgage, there is left, in our judgment, but little room for doubt.

The next inquiry is whether Rosenthal procured this mortgage to be assigned to Bloch, who held the lien thereby created in trust for him. The evidence tends to show that in 1861 Rosenthal was very poor, and, with his family, was living on leased land, keeping a few cows, and supplying milk to his customers in Portland; that about that time he became acquainted with Bloch, who was then wealthy, and engaged in the wholesale grocery business in Portland, and, being Jews, a strong friendship sprang up and existed between them, so much so that Bloch loaned him money to buy cows, and also furnished him groceries on credit for his family, and feed for his stock; and on May 12, 1862, being indebted on account

thereof in about the sum of \$500 or \$600, for which, and future advances expected, he gave Bloch a promissory note for \$1,500, to secure the payment of which he and his wife, on November 3, 1863, executed to Bloch a mortgage of said land. This mortgage was executed the same day that J. V. Clary's note was settled at the bank, though the formal assignment of the Clary mortgage was not executed until two days thereafter. That Rosenthal should have executed his mortgage the same day the remainder of the money was paid to the bank, might seem to raise an inference that Bloch was acting in this matter in his behalf. But Rosenthal testified that he never knew of the existence of the Clary mortgage until some time after 1865, and the record contains no testimony tending to contradict him in this respect. When it is remembered that Rosenthal was very poor at that time, and indebted to Bloch in quite a sum, it is but reasonable to suppose that Bloch, believing Rosenthal had a life estate only in the premises, would seek to protect his own interests, and thus secure from Rosenthal the payment of the amount due him, which could best be accomplished by obtaining the legal title to the land, which he knew he could secure by the assignment of the Clary mortgage, which then amounted to more than the value of the land. Bloch being thus obliged to procure an assignment of the Clary mortgage, it is but reasonable to suppose that he did so after obtaining Rosenthal's mortgage; and the circumstance that the Clary note was paid off and the latter mortgage executed on the same day is explainable on a reasonable hypothesis, and does not, in our judgment, tend to show that Bloch was acting in the matter as trustee for Rosenthal, or that he informed the latter about the method he had adopted to secure his debt.

The most important question to be considered is

whether Rosenthal, as administrator, sold the land belonging to Clary's estate under any agreement or understanding that the title should be held in trust for him. Rosenthal testifies that, having made payments to Bloch until he owed him about \$800, the latter, anticipating financial difficulties, demanded the amount so due, to settle which he, at Bloch's request, executed a conveyance of all his interest in the land to Goldsmith, who took the title to protect and to hold in trust for Bloch; that, having conveyed his interest in said land, he thereupon leased other lands, and made preparations to move off the premises, but Bloch, having purchased the land at administrator's sale, requested him to remain thereon until he could find a purchaser thereof, agreeing to pay him for clearing the same the sum of \$100 per acre, and that the only rent he would demand was to keep the fences in repair; that he accepted this offer, and after remaining on the land as a tenant for about one year, he then for the first time tried to purchase it from Bloch, but did not succeed in consummating a bargain therefor until 1873 or 1874, when it was agreed that he might have the land for the sum of \$3,000; that he thereupon sold his cows, realizing therefrom the sum of \$700, and, having sold a crop of potatoes to good advantage, he paid the proceeds thereof to Bloch, and on April 26, 1876, having paid the full purchase price, Goldsmith conveyed the land to him. Goldsmith, as a witness for plaintiffs, testified that he had an indistinct recollection that in 1871 Bloch and Rosenthal had a conversation with him regarding some land, and in answer to the direction, "Just state what that recollection is in full and in detail," says: "So far as I remember, Mr. Bloch and Mr. Rosenthal came to me, and asked me to take a deed for some property that was in Bloch's name, and hold it until Bloch would tell me to make a deed for it to Rosen-

thal. They asked me whether I would do it and I told them yes, and they made a deed to me to certain property. I don't remember what it was, but it was some property on the other side of the river; and at the proper time, I suppose, when Bloch told me, I conveyed it to Rosenthal again." On cross-examination this witness says, in substance, that he never looked upon or regarded Rosenthal as an intimate friend, but that Bloch and he were at one time rather intimate, and quite friendly, in consequence of which he took the title to said property on Bloch's account, rather than as Rosenthal's friend; that he did not know there was any agreement or understanding between Bloch and Rosenthal concerning this land, and that the impression that he was to convey the land to Rosenthal might have been based upon the fact that Rosenthal and Bloch came to see him at the same time.

Mrs. Bloch, appearing as a witness for plaintiffs, testified that in consequence of her illness her husband never told her anything about his business affairs, but that on one occasion, in referring to the purchase of the Clary land at the administrator's sale, he said that it had not cost him anything. This witness, in answer to the question propounded on her direct examination, as to when a certain transaction occurred, said: "I don't know. I can't remember. I have no memory any more." Thomas Trengrove, being called as a witness for plaintiffs, in speaking of what Rosenthal told him about his difficulty in keeping the Clary land, says: "And he was talking about it, and he was finally congratulating himself to me that his friends—his Jewish friends—had come to his relief, and he would not be injured on his place; he would still retain it; and they were holding it over for him until such time as he could recover it, as I understood him, from them." Rosen-

thal's wife and several of their children corroborate his testimony to the effect that when they knew that Bloch was in failing circumstances, necessitating a sale of their interest in the land to pay him the amount due, they made arrangements to move off the premises, and with that in view they rented land in another neighborhood, to which they intended to move with their stock ; but that, after the land was sold by the administrator, and purchased by Bloch, they remained thereon at his request under an agreement with him to keep up the repairs for the rent of the land until he could find a purchaser ; that, after having been in possession of the land two or three years, an arrangement was consummated by the terms of which it was agreed that it should be conveyed to Rosenthal upon the payment of the sum of \$3,000, which was fully paid when Goldsmith executed his deed therefor. Trengrove is not certain as to the time when Rosenthal made the declaration attributed to him, which, in all probability occurred after he had effected an agreement to repurchase the land ; and an admission made at such time is perfectly compatible with the testimony so given by the defendants.

Mrs. Bloch's testimony is of little value by reason of her defective memory, and because her husband, in consequence of her sickness, tried to avoid worrying her with his business cares ; and knowing, as she probably did, that he was financially embarrassed, he might say that the purchase of the land had not cost him anything, meaning thereby that he had not paid out any additional consideration therefor. Mr. Goldsmith's testimony shows how indistinct his recollection of the transaction is, and that he took the title to the property on Bloch's account, and not by reason of any friendship he entertained for Rosenthal. A consideration of the attending circumstances leads us to believe that the time Bloch and Rosen-

thal visited Goldsmith, as testified to by him, must have been after the agreement to repurchase the land had been effected between Bloch and Rosenthal. C. O. Hosford, a witness called by plaintiffs, testified on cross-examination that in 1872 or 1873 he tried to buy the Clary land from Bloch, but that they could not agree upon the purchase price, and in answer to the question, "Do I understand you to say that your present impression is that Mr. Bloch offered to sell that property to you at a certain figure, but he stated the title was in Mr. Goldsmith?" the witness said, "I think so." Certified copies of certain portions of the tax rolls of Multnomah County were offered in evidence, and show that the land was assessed in 1871 and 1872 to "Owners unknown;" that the tax roll of that county for the year 1873 could not be found, but that the land was sold for the payment of the delinquent tax of that year to one William Barnes, from whom Rosenthal obtained a quitclaim deed; and that in 1874, 1875, and 1876 the land was assessed to Rosenthal—thus tending to show that Rosenthal effected the agreement to repurchase the land in 1873 or 1874. Every witness who testifies on the subject admits that in 1871 Rosenthal was so poor that he could not have obtained the means necessary to have purchased the land. Senators Dolph and Mitchell were attorneys for the administrator in the settlement of the Clary estate, and each testified, in substance, that he had every reason to believe that Bloch's claim against the estate was just, and that Rosenthal acted in all these matters in good faith. Mr. Benton Killin was appointed and acted as guardian *ad litem* for the plaintiffs, who were then minors, and his testimony is substantially to the same effect. The testimony of these witnesses serves to dispel any doubt that might arise from the consideration of Mr. Goldsmith's testimony, and leads

us to believe that Rosenthal was not guilty of any fraud in the management of said estate, or in the sale of the property belonging thereto.

Assuming, without deciding, that the administrator's deed is void by reason of the lack of jurisdiction of the County Court of Multnomah County to order a sale of the land, can it not be said that plaintiffs' claim to the premises is a stale equity, which is barred by their laches, when it is remembered that Rosenthal, for a period of nineteen years prior to the commencement of this suit, and for more than fifteen years after the youngest heir became of age, has been in the open, notorious, and exclusive possession of the land, claiming a right thereto under Goldsmith's deed? In *Badger v. Badger* 69 U. S. (2 Wall.) 87, it is held that courts of equity, acting on their own inherent doctrine of discharging, for the peace of society, antiquated demands, refuse to interfere in attempts to establish a stale trust, except where (1) the trust is clearly established, and (2) the facts have been fraudulently and successfully concealed by the trustee from the knowledge of the *cestui que trust*. "In order," says Mr. Justice WOLVERTON, in *Raymond v. Flavel*, 27 Or. 219 (40 Pac. 158), "to call into activity a court of equity, there must be an exercise of good conscience, good faith, and reasonable diligence; and, where time and long acquiescence have obscured the nature and character of the trust, or the acts of the parties, or other circumstances give rise to presumptions unfavorable to its continuance, the court is passive, and does nothing, because of its inability to do complete justice." To the same effect, see also *Sedlak v. Sedlak*, 14 Or. 540 (13 Pac. 452); *Teall v. Slaven*, 40 Fed. 774; *Naddo v. Bardon*, 2 C. C. A. 335, 51 Fed. 493; *Pratt v. California Mining Co.*, 9 Sawy. 354, 24 Fed. 869; *Marsh v. Whitmore*, 88 U. S. (21 Wall.) 178; *Brown v. County of Buena Vista*, 95 U.

S. 157; *Mackall v. Casilear*, 137 U. S. 556 (11 Sup. Ct. 178); *Hanner v. Moulton*, 138 U. S. 486 (11 Sup. Ct. 408); *Felix v. Patrick*, 145 U. S. 317 (12 Sup. Ct. 862); *Gallihier v. Cadwell*, 145 U. S. 368 (12 Sup. Ct. 873); *Johnston v. Standard Mining Co.*, 148 U. S. 360 (13 Sup. Ct. 585); *Abraham v. Ordway*, 158 U. S. 416 (15 Sup. Ct. 894).

Assuming that plaintiffs' complaint, hereinbefore quoted, complies with the rule prescribed in *Badger v. Badger*, 69 U. S. (2 Wall.) 87, that "the party who makes such appeal should set forth in his bill specifically what were the impediments to an earlier prosecution of his claim; how he came to be so long ignorant of his rights, and the means used by the respondent to fraudulently keep him in ignorance; and how and when he first came to a knowledge of the matters alleged in his bill; otherwise the chancellor may justly refuse to consider his case, on his own showing, without inquiring whether there was a demurrer or formal plea of the statute of limitations contained in the answer,"—nevertheless, to entitle them to recover thereon, they must show that by the exercise of reasonable diligence they would have failed to discover the fraud of which they aver they were ignorant. In *Johnston v. Standard Mining Co.*, 148 U. S. 360 (13 Sup. Ct. 585), it is held that, where a question of laches is in issue, the plaintiff is chargeable with such knowledge as he might have obtained upon inquiry, provided the facts already known to him were such as to put the duty of inquiry upon a man of ordinary intelligence. In *Bacon v. Chase*, 83 Iowa, 521 (50 N. W. 23), the facts were that a man, having died in Iowa, seised of certain lands in that state, left surviving him several minor children, who resided in Massachusetts. These lands, without notice

to them, were sold by order of the Probate Court of Woodbury County, Iowa, to pay the debts of the estate. Ten years after the youngest heir became of age suit was instituted to recover such lands from the purchasers under the administrator's sale, and, it appearing at the trial that the heirs had known for many years that their ancestor died seised of these lands, but they had made no inquiries as to their rights until a short time prior to the commencement of the suit, it was held that they were guilty of such laches as to preclude their right of recovery. To the same effect, see *Teall v. Slaven*, 40 Fed. 774; *Naddo v. Bardon*, 51 Fed. 493 (2 C. C. A. 335); *Hayward v. Elliott National Bank*, 96 U. S. 611; *New Albany v. Burke*, 78 U. S. (11 Wall.) 96; *Hardt v. Heidweyer*, 152 U. S. 547 (14 Sup. Ct. 671).

When the property forming the subject of the suit is speculative in character, thereby rendering it liable to great and rapid fluctuations in value, prompt action by the party claiming to have been defrauded by its transfer is necessary to repel the imputation of laches which a court of equity invokes from any unreasonable delay in applying to it for relief: *Hammond v. Hopkins*, 143 U. S. 224 (12 Sup. Ct. 418); *Twin Lick Oil Co. v. Marbury*, 91 U. S. 587; *Pratt v. California Mining Co.*, 24 Fed. 869, 9 Sawy. 354; *Hayward v. Elliott National Bank*, 96 U. S. 611. Rosenthal cut and removed the heavy timber which grew upon the land, rendering it arable. He set out orchards, erected costly buildings, and made other valuable improvements. He laid out a part of the tract into lots and blocks, many of which he has sold and conveyed; and he contributed the sum of \$5,000 to secure the building of an electric railway from the City of Portland to the premises, of which he has had the exclusive possession until the land is worth, as plaintiffs allege, the sum of \$100,000. The great

and rapid increase in the value of this land imposed upon plaintiffs the duty of acting promptly in seeking to recover it, unless they could not, by the exercise of reasonable diligence, have discovered the fraud of which they complain, for, as was said by Mr. Chief Justice LORD in *Sedlak v. Sedlak*, 14 Or. 540 (13 Pac. 452): "The general rule, without doubt, is that no lapse of time or delay in bringing the suit will be a bar to the remedy in equity, providing the injured party during the interval was ignorant of the fraud. But the ignorance of such party must not have been negligent, for if, by reasonable diligence, the fraud could have been discovered, or ought to have been known, he will be deemed guilty of laches, or of acquiescence, and equity will refuse to interfere." The plaintiffs were, on January 23, 1871, personally cited to appear in the county court of said county, and show why an order should not be made to sell the real property of which their father died seised, and at that time Olive was fifteen, Lola twelve, and Katie ten years old, and each must have known that her father, at his death, was the owner of the property. The evidence tends to show that Olive, after her marriage, lived for several months just across the county road from this land, and that she frequently called at Rosenthals, and that her sisters, then living in Portland, visited her at this place, and also called upon Rosenthal's daughters. An examination of the records of deeds of said county would have disclosed that the administrator's and Goldsmith's deeds of said land were duly recorded April 18, 1871, and April 29, 1876, respectively, and knowing, as they must, that their father died seised of this land, their failure to examine such record renders their laches so gross as to preclude their recovery of the land, and hence the decree is affirmed.

AFFIRMED.

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2. The death of a party after an appeal has been perfected does not abate the appeal, and the substitution of the proper persons may be made at any time. Section 38, Hill's Ann. Laws, applies only in cases where the death occurs before the appeal.—*Long v. Thompson*, 359.

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3. An agent who makes a contract on behalf of his principal in excess of his authority is, on the repudiation of the contract by the principal, personally liable thereon, though he made no false representations as to his authority, since he impliedly warranted that he was empowered to make the contract. The action will be in contract rather than in tort.—*Cochran v. Baker*, 555.

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2. An affidavit for publication of summons sufficiently shows, as against collateral attack that defendants could not be served in the state, by a statement that they reside in the State of Washington, and that at the time of making the affidavit they were not in Oregon.—*Bank of Colfax v. Richardson*, 519.

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2. A letter from an insurance company to a person soliciting business for it, directing him, on account of the death of a person designated as "our late manager," to report his business to the company's cashier, is admissible upon the question as to what the authority was of the person so designated.—*Foste v. Standard Insurance Company*, 125.

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UNAUTHORIZED CONTRACT BY AGENT—LIABILITY—FORM OF ACTION.

9. An agent who makes a contract on behalf of his principal in excess of his authority is, on the repudiation of the contract by the principal, individually liable thereon, though he made no false representations as to his authority, since he impliedly warranted that he was empowered to make the contract. The action will be in contract rather than in tort.—*Cochran v. Baker*, 555.

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5. A notice of appeal from the circuit court, signed by the attorneys in behalf of a board, which signature was authorized by the president of the board, and afterwards ratified by the rest of the members, is sufficient, so far as the attorneys' authority is concerned, to give the supreme court jurisdiction.—*State ex rel. v. Estes*, 197.

6. Jurisdiction of an appeal cannot be acquired by the admission of service of notice of appeal by the attorney of a party who died prior to such admission, where the attorney had not been retained by the personal representatives of the deceased, who had been substituted.—*Holt v. Idleman*, 114.

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7. A proceeding by the state on the relation of sundry persons to revoke the license of a physician is *quasi* criminal in its nature, and a service of the notice of appeal on the state is sufficient; it need not be served on either the relators or the State Board of Medical Examiners.—*State ex rel. v. Estes*, 197.

SUFFICIENCY OF OBJECTION TO SERVICE OF NOTICE.

8. A motion to dismiss an appeal to a circuit court for some technical error in the proceedings will not be considered in the supreme court unless the alleged error was specifically stated so that the circuit court could have considered it—in other words, such an objection, not affecting the jurisdiction, cannot be raised for the first time in the supreme court.—*State ex rel. v. Estes*, 197.

SUFFICIENCY OF MOTION TO DISMISS.

9. Under the rule that one who claims an advantage on purely technical grounds must himself have complied with every such requirement, a claim that "no appeal bond as required by law" was given is not sustained by proof that the bond given was perfect, except that the liability of the sureties was limited, for the alleged error is not definitely pointed out.—*State ex rel. v. Estes*, 197.

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10. Before an appeal is determined a motion to expunge a portion of the adverse party's brief will be denied, where it is not claimed that the matter assailed is of such a nature as to require prompt action to protect the dignity of the court, though such a motion may be afterward considered on the question of costs.—*White v. White*, 142.

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12. Hill's Ann. Laws, § 2572, providing that the Superintendent of Public Instruction "shall decide, without cost to the parties appealing, all questions and disputes that may arise under the school laws," does not authorize an appeal to him from a decision of a county superintendent.—*School District v. Irwin*, 481.

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13. Where a statute imposes on the clerk of the trial court, or the secretary of a board, the duty of filing the transcript on appeal, and the officer has complied therewith so far as the filing is concerned, the fact that the certificate authenticating the transcript was irregular, so that it had to be amended, which was not done until after the expiration of the time allowed by statute to file such transcript, does not make appellant responsible for such delay, or affect the appeal.—*State ex rel v. Estes*, 197.

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15. A defendant whose mortgage is upheld by a decree in a suit to set aside several mortgages is a necessary party to an appeal by a co-defendant whose prior mortgage is held invalid, and must be served with notice of such appeal, under Section 537 of Hill's Ann. Laws.—*Conrad v. Pacific Packing Co.*, 337.

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16. A case will not be remanded on appeal for the failure of the court below to take special action upon an application to bring in a new party, where, from the respective averments of the parties, it is apparent that he was neither a necessary nor a proper party to the suit.—*Pellets v. Comer*, 36.

PRESUMPTION AS TO EFFECT OF ERROR.

17. Where error appears in the record, there is no presumption that it was rendered harmless by any subsequent evidence or proceeding. If such was the case the matter showing it should have been included in the bill of exceptions.—*Cleveland Oil Company v. Norwich Insurance Society*, 228.

PRESUMPTION OF CORRECTNESS.

18. When the transcript shows that the record below included a paper which may have contained recitals that would sustain the judgment, and which the trial court must have considered in reaching a decision, the appellate court will presume that the judgment appealed from was correct in the absence of such paper.—*Cleveland Oil Company v. Norwich Insurance Society*, 228.

PRESUMPTION OF VERITY OF RECORD.

19. *Prima facie* a certified record recites the facts, it imports verity; thus, where a transcript states that after a certain pleading had been filed, the cause "was tried by a jury upon the issues joined by the pleadings," the appellate court must infer that the particular pleading was a factor in the trial, though the party who filed it insists that it was used only in determining a motion.—*Robinson v. Carlton*, 319.

PRESUMPTION THAT PUBLIC BOARD ACTED WITHIN THE LAW.

20. It will be presumed that the State Board of Equalization proceeded to equalize values by the money standard, as provided by law, in the absence of a showing to the contrary.—*Dayton v. Multnomah County*, 289.

RULES OF COURT—ABSTRACT OF RECORD.

21. An objection that appellant's abstract is not indexed as required by rule 9 of this court (24 Or. 596) comes too late after respondent has filed a brief on the merits of the case.—*Whipple v. Southern Pacific Company*, 370.

AMENDING BILL OF EXCEPTIONS AFTER APPEAL.

22. A bill of exceptions which, through inadvertence or mistake has been incorrectly made up, may, by order of the trial court entered *nunc pro tunc* on proper notice, be so amended at a subsequent term that it will accord with the real facts, even though an appeal is pending.—*State ex rel. v. Estes*, 197.

CONCLUSIVENESS OF CERTIFICATE TO BILL OF EXCEPTIONS.

23. The presumption on appeal that a stipulation not incorporated in a bill of exceptions which may have included recitals which would sustain the judgment did include them yields to the judge's certificate appended to the bill of exceptions, stating that it constitutes all the testimony introduced or received upon the trial, and upon which the respondent relies to sustain the verdict, and that there is no other testimony in the case which can be claimed as tending to sanction said verdict, as the word testimony is broad enough to include evidence.—*Cleveland Oil Company v. Norwich Insurance Society*, 228.

MEDICAL BOARD—APPEAL—VENUE.

24. An appeal from the Board of Medical Examiners will not be dismissed where the motion to dismiss recites that the hearing by the board was in the county to the circuit court of which the appeal has been taken as required by law, and the verdict and decision of the board purports to have been made in that county, although the regular meetings of the board are required to be held in another county.—*State ex rel. v. Estes*, 198.

REMITTITUR—POWER OF SUPREME COURT TO CORRECT JUDGMENT.

25. Where there is an erroneous judgment at law entered on undisputed facts, the supreme court may remand the case with directions to enter a particular judgment; or, if a judgment is manifestly excessive, by an inspection of the record, and the amount thereof is apparent, the court may affirm the judgment on penalty of a new trial unless the excess is remitted.—*Cochran v. Baker*, 565.

AMENDING DECREE AFTER APPEAL.

26. A decree cannot be amended in the supreme court on motion of a party who did not appeal, since the jurisdiction of that court is confined to the revising of final decisions appealed from.—*Conrad v. Pacific Packing Co.*, 387.

WILLS—WEIGHT OF EVIDENCE.

27. The conclusion of the county judge who heard the witnesses, and was the neighbor of most of them, upon the issue as to undue influence in procuring the execution of a will is entitled to great weight on appeal, and his decision will be upheld unless the appellate court can say from an examination of the record that the weight of the testimony is the other way.—*In re Dars's Will*, 58.

CONSIDERATION OF IMMATERIAL TESTIMONY.

28. Testimony introduced on an immaterial matter not in issue cannot be considered on appeal in an equity case tried *de novo*, although no exception was taken to its admission.—*Hagen v. Smith*, 394.

HARMLESS ERROR.

29. Admission of the testimony of an agent as to the rate of commissions paid him by an insurance company is not prejudicial error in an action by him against the company for unpaid commissions where secondary evidence of the contract between them is not received, and a letter from the company's cashier containing a statement of the rate of commissions and the amount due the agent is admitted in evidence.—*Poste v. Standard Insurance Co.*, 125.

30. The prevailing party cannot complain that certain papers or pleadings presented by the other side were considered, for no injury resulted if error was committed.—*Robinson v. Carlon*, 319.

COSTS ON APPEAL.

31. Costs and disbursements, as a general rule, should be allowed the prevailing party in a suit in equity as well as in an action at law, but the trial courts are given a discretion in the matter by section 554 of our statutes, which will not be interfered with on appeal except for an abuse.—*Dimmick v. Rosenfeld*, 101.

REVIEW OF PROCEEDINGS OF BOARD OF EQUALIZATION.

32. The appellate court will not disturb the judgment and findings of a board of equalization where it is not shown that the board acted arbitrarily or fraudulently in the equalization of values.—*Dayton v. Multnomah County*, 238.

ERROR TO TRY CASE WITHOUT MAKING UP ISSUES.

33. Where parties stipulated that the findings of fact in a suit in equity should become the findings of fact in a certain action at law, it was error, on a dismissal of defendant's complaint for want of equity, without any findings, to render judgment in the action without making up the issues at law, and proceeding to a trial thereof.—*Small v. Lutz*, 131.

ELECTION CONTESTS—QUESTIONS REVIEWED ON APPEAL.

34. An appeal to the supreme court from a judgment upon the trial of an election contest does not bring up the cause for trial *de novo*, but the questions presented for review are the conclusions of law from the findings of fact.—*Van Winkle v. Crabtree*, 463.

35. A judgment in an election contest will not be reversed because the court erroneously counted a void ballot for respondent, where it also counted void ballots for appellant, so that in spite of its error, the judgment is correct; and this even where respondent did not appeal, since it is the duty of the appellate court to declare the law applicable to the facts, and correct any error apparent on the record, whether it is complained of or not.—*Van Winkle v. Crabtree*, 464.

PREMATURE APPEAL.

36. Failure of the trial court to act upon a motion by the appellee to strike from the files an undertaking on appeal, for defects therein, is not available to him in the appellate court, on a claim that the appeal was prematurely taken, for Hill's Ann. Laws, § 537, Subd. 4, providing that when a party in good faith gives notice of appeal, and thereafter omits, through mistake, to do any other act, including the filing of an undertaking, necessary to perfect the appeal, the trial court or the appellate court may permit an amendment or performance of such act on such terms as are just, does not confer on the trial court any jurisdiction to pass on the sufficiency of the notice of appeal, or of any other jurisdictional proceeding required to perfect the appeal, and of course there was nothing to be decided, so the appeal was not premature.—*Elwert v. Norton*, 567.

APPEAL—FILING NEW BOND.

37. Where a challenge to the sufficiency of an undertaking on appeal is sustained by the supreme court, it will allow appellant to file a new undertaking without any cross motion for leave to do so; and hence a motion for leave will not be denied because it was filed after a motion to dismiss because of an insufficient undertaking.—*Elwert v. Norton*, 567.

APPEALABLE ERROR—EXCESSIVE DAMAGES.

38. The refusal of the trial court to set aside a verdict because of excessive damages is not reviewable.—*Coos Bay Navigation Company v. Endicott*, 574.

EXPECTED ANSWER.

39. Sustaining an objection to questions propounded to a witness cannot be said to be erroneous where the record does not disclose the particular facts sought to be elicited by the question.—*Coos Bay Navigation Company v. Endicott*, 574.

APPOINTING POWER

May be With Executive or Legislature. See CONSTITUTIONAL LAW, 1.

To Fill Vacancy in Board of Railroad Commissioners. See CONST. LAW, 1, 2.

ASSESSMENT of Taxes.

Power of County Board of Equalization to Assess. See TAXES, 6.

ASSIGNMENT OF ERRORS. See WRIT OF REVIEW, 7.

ATTACHMENT AND GARNISHMENT.

PLEADING—DENIAL OF AFFIDAVIT FOR ATTACHMENT.

1. A traverse of the facts alleged in an affidavit for attachment must deny every statutory ground alleged in as direct and explicit terms as if it were an answer to a complaint, and it must be tested by the same rules as though it were a pleading.—*Watson v. Loewenberg*, 323.

WHEN SECURITY WILL PREVENT ATTACHMENT.

2. The security referred to in Section 144, Hill's Ann. Laws, the possession of which will prevent the issuing of an attachment, must be conceded and unquestioned, and not a disputed or contingent security.—*Watson v. Loewenberg*, 323.

DISSOLVING ATTACHMENT—SUFFICIENCY OF AFFIDAVIT.

3. An attachment will not be set aside on the ground that the debt sued upon is secured where the traversing affidavit does not allege or admit that fact, but states that plaintiff's assignor claims the right to hold certain property in its possession as collateral security for the indebtedness sued on, and contends that if that is true the attachment should be dissolved.—*Watson v. Loewenberg*, 328.

LEVY BY SEIZURE—GARNISHMENT.

4. The mere piling of rails on the wharf of a railroad company by the contractor who is building the road, does not constitute such a possession of them by the company as will prevent a valid levy upon them by actual seizure as the property of the contractor, if they in fact belong to him.—*Los Bay Railroad Company v. Siglin*, 80.

EFFECT OF PRESENTING CLAIM TO ADMINISTRATOR.

5. A creditor who has acquired an attachment lien before the death of the defendant does not lose his right to enforce such lien by presenting the claim on which the action was based to the administrator of the deceased and having it allowed.—*White v. Ladd*, 422.

LEVY ON LAND OF NONRESIDENT.

6. Under Hill's Ann. Laws, § 149, providing that real property may be attached by leaving a copy of the writ in a conspicuous place thereon, if there be no occupant, a valid attachment of real property may be made by leaving a copy of the writ in a conspicuous place thereon, if the officer at the time of visiting the land for the purpose of levying his writ does not find any one visibly in possession.—*Bank of Colfax v. Richardson*, 518.

LEVY OF ATTACHMENT—ABSENCE OF OCCUPANT.

7. A return on a writ of attachment reciting that when the writ was served there was "no occupant thereof on the premises," should be construed to mean that the place was entirely unoccupied, rather than that the premises were actually occupied, but that the occupant was temporarily absent at the time of the officer's visit.—*Bank of Colfax v. Richardson*, 518.

JURISDICTION BY ATTACHMENT—NONRESIDENT.

8. In Oregon the preliminary seizure of the property of a nonresident in an action on a money demand is not a statutory prerequisite to jurisdiction; that requirement is entirely judicial.—*Bank of Colfax v. Richardson*, 518.

COLLATERAL ATTACK—JURISDICTION OVER ATTACHED PROPERTY.

9. In an action against a nonresident on a money demand, the actual seizure of property of the defendant under a lawful writ of attachment issued in such action confers jurisdiction over the property seized, as against a collateral attack, though there may be errors in the attachment proceedings, or in determining the liability of the property for the plaintiff's demand.—*Bank of Colfax v. Richardson*, 518.

ATTACK ON RETURN—LEAVING IN CONSPICUOUS PLACE.

10. Though Hill's Ann. Laws, § 149, provides that real property shall be attached, if there be no occupant, by leaving a copy of the writ in a conspicuous place thereon, it is enough, as against collateral attack on the resulting judgment, for the return to recite that the copy was left in a conspicuous place, without pointing out the place.—*Bank of Colfax v. Richardson*, 519.

ATTACK ON RETURN—OWNERSHIP OF ATTACHED PROPERTY.

11. The omission of the return of a levy of attachment upon real property to state that the property attached was the property of the defendant in the writ does not render it subject to collateral attack.—*Bank of Colfax v. Richardson*, 519.

ATTACK ON RETURN—LEAVING A COPY OF WRIT.

12. A return of an officer that he attached real estate by "posting" a copy of the writ in a conspicuous place thereon sufficiently shows, as against a collateral attack on a judgment, the "leaving" of a copy in such place.—*Bank of Colfax v. Richardson*, 519.

OWNERSHIP OF PROPERTY BY DEFENDANT—AFFIDAVIT FOR PUBLICATION.

13. An affidavit on which was based an order for publication of a summons sufficiently shows, as against collateral attack, that the nonresident defendants had property in the state, by a recital that the attachment was levied "on certain real property of the defendants in B. County, Oregon."—*Bank of Colfax v. Richardson*, 519.

FRAUDULENT CONVEYANCE—ATTACHMENT.

14. Real property fraudulently conveyed by a debtor is as much subject to attachment as though the conveyance had never been made.—*Bank of Colfax v. Richardson*, 530.

ATTORNEY AND CLIENT.

NOTICE OF APPEAL—AUTHORITY OF ATTORNEYS.

1. A notice of appeal from the circuit court, signed by the attorneys in behalf of a board, which signature was authorized by the president of the board, and afterwards ratified by the rest of the members, is sufficient, so far as the attorneys' authority is concerned, to give the supreme court jurisdiction.—*State ex rel. v. Estes*, 196.

AUTHORITY OF ATTORNEY AFTER DEATH OF CLIENT.

2. Jurisdiction of an appeal cannot be acquired by the admission of service of notice of appeal by the attorney of a party who died prior to such admission, where the attorney had not been retained by the personal representatives of the deceased, who had been substituted, for the reason that the death of a client pending an action or proceeding terminates the authority of the attorney, and the subsequent continuance of the suit by the attorney, in the name of the representatives, without their consent, is unwarranted.—*Holt v. Idelman*, 114.

LIABILITY OF ATTORNEY FOLLOWING CLIENT'S INSTRUCTIONS.

3. An attorney is not liable for negligence in not suing a certain person on a certain claim where the client, with full knowledge of the facts, directed him to sue another person on such claim.—*Lord v. Hamilton*, 443.

AUSTRALIAN BALLOT LAW.

Law is Mandatory as to Method of Voting. See ELECTIONS, 1.

Voting Marks and Location Thereof. See ELECTIONS, 3-10.

Distinguishing Marks Invalidating Ballot. See ELECTIONS, 11-13.

AUTHORITY

Of Agent to Waive Lien—To Sell School Lands. See AGENTS, 4, 5, 6.

Of Attorneys After Death of Client. See ATTORNEYS, 1, 2.

BALLOTS

Must be Marked as Statute Directs. See ELECTIONS, 1.

Voting Marks That Should be Counted. See ELECTIONS, 6, 8, 9.

Voting Marks That Should Not be Counted. See ELECTIONS, 3, 4, 5, 7, 10.

Distinguishing Marks Invalidating Ballot. See ELECTIONS, 11, 12, 13.

BANKS AND BANKING.

CONSIDERATION FOR SERVICES.

1. An agreement by a bank to collect a check and issue a certificate of deposit for the proceeds, is based on a sufficient consideration to make the bank liable for negligence in attempting the collection.—*Kershaw v. Ladd*, 375.

NEGLIGENCE IN COLLECTION.

2. It is not negligence for a bank which has received for collection an ordinary undorsed check to send it to the drawee with a request for payment, where such is the custom among banks.—*Kershaw v. Ladd*, 375.

3. Where a collecting bank accepted in payment of the collection a check or draft which was dishonored on presentation, it is not liable to the sender of the claim where the latter was not thereby injured.—*Kershaw v. Ladd*, 376.

REASONABLENESS OF CUSTOM.

4. A custom of banks to send checks direct to the drawee banks for collection and return is not unreasonable, at least as applied to the collection of a plain undorsed check.—*Kershaw v. Ladd*, 376.

BANKS—TIME FOR PRESENTING CHECK.

5. The question of how much time may be used in presenting a check or draft and demanding payment is reviewed and a number of authorities cited, though it is not one of the points decided.—*Kershaw v. Ladd* at pp. 380, 381.

GENERAL DEPOSIT BECOMES PROPERTY OF THE BANK.

6. Where an administrator makes a general deposit of the money of the estate in a bank of which he is president, it creates the relation of creditor and debtor, giving the bank the right to mingle the money with its own funds.—*Shute v. Hinman* at p. 583.

BAWDY HOUSE

Is a Public Nuisance Wherever Situated. See NUISANCE, 2.
Power of Equity to Enjoin Erection of. See EQUITY, 4, 7.

BILL OF EXCEPTIONS.

Amendment After Appeal has Been Perfected. See APPEAL, 22.
Amendment at Subsequent Term on Notice. See APPEAL, 22.

BILL OF EXCHANGE.

Verbal Acceptance of Is Not Binding. See BILLS AND NOTES, 1.

BILLS AND NOTES.

ORAL ACCEPTANCE.

1. Under Section 3194, Hill's Ann Laws, no liability is incurred by the verbal acceptance of a bill of exchange, and either drawer or drawee may urge the objection that the acceptance was not written.—*Erickson v. Inman*, 44.

ORDER OPERATING AS AN EQUITABLE ASSIGNMENT.

2. To give an unaccepted draft or order the effect of an equitable assignment of a fund, it must, by its terms, be drawn upon that fund.—*Erickson v. Inman*, 44.

BOARD OF EQUALIZATION.

STATE BOARD OF EQUALIZATION—NECESSARY RECORD.

1. Under the law of 1881, the record on which the State Board of Equalization proceeds to equalize the assessments between different counties is an abstract of the different county records, and it is not necessary that the original rolls be filed at all.—*Dayton v. Multnomah County*, 239.

IRREGULAR CLASSIFICATION.

2. The fact that a designated class of property has been subdivided by a county assessor will not invalidate the roll, for by adding the subdivisions the required classification is obtained.—*Dayton v. Multnomah County*, 239.

JUDICIAL NOTICE.

3. The courts cannot take judicial knowledge that values have been unreasonably increased or diminished under a system adopted for ultimate equalization.—*Dayton v. Multnomah County*, 239.

REVIEW OF PROCEEDINGS OF BOARD OF EQUALIZATION.

4. The appellate court will not disturb the judgment and findings of a board of equalization where it is not shown that the board acted arbitrarily or fraudulently in the equalization of values.—*Dayton v. Multnomah County*, 239.

EQUALITY AND UNIFORMITY OF TAXATION.

5. The failure of the board of equalization properly to equalize assessments upon personal property throughout the several counties of the state does not produce such lack of equality and uniformity of taxation as to invalidate its acts in equalizing values upon real property.—*Dayton v. Multnomah County*, 239.

COUNTY BOARD OF EQUALIZATION—POWER TO ASSESS.

6. A county board of equalization may assess property taxable in its county omitted by the assessor from the roll, and fix a valuation thereon, under Hill's Ann. Laws, §§ 2778, 2779, without other notice than the general one given under the statute by the assessor of the meeting of the board to correct and equalize the assessment roll.—*Kirkwood v. Ford*, 552.

BOND FOR DEED.

Right Obtained by a Contract of Sale. See VENDOR AND PURCHASER, 6.
Right of Oblige in Bond to Possession. See VENDOR AND PURCHASER, 7.
Interest Is Consideration for Possession. See VENDOR AND PURCHASER, 8.
Obligee Refusing to Pay Is Liable for Rent. See VENDOR AND PUR., 9.
Forfeiture When Obligor Is in Default. See VENDOR AND PURCHASER, 10.

Tenancy Under a Contract—Termination. See VENDOR AND PUR., 11.
 Right of Tenant Under a Contract to Emblements. See VEN. AND PUR., 12.
 Foreclosure Suit as Notice to Oblige to Quit. See VENDOR AND PUR., 13.
 Adverse Possession Under Contract to Buy. See VENDOR AND PUR., 5.

BONDS.

JOINT AND SEVERAL JUDGMENT—JOINT BOND.

1. In an action on a bond of indemnity given by several parties, a recovery must be had against all or none, unless one or more has set up and maintained a defense personal to himself.—*Thomas v. Barnes*, 416.

INDEMNITY TO OFFICER—DEFENSE.

2. Where several attaching creditors give a bond to the sheriff conditioned that, if he will hold certain attached property against all claimants, defendants will indemnify him against any loss or damages by reason thereof, a direction to release one or more attachments would constitute no defense, the liability not being severable.—*Thomas v. Barnes*, 416.

ACTION ON BOND—COMPLAINT CONSTRUED.

3. The complaint in an action on an insurance agent's bond reviewed, and held to be for damages accruing from a breach of the bond.—*Bailey v. Wilson*, 186.

BRIDGES.

MUNICIPAL CORPORATIONS—CONSTRUCTION OF STATUTE.

The power conferred by the legislature upon the Bridge Committee of the City of Portland to enter into such contracts as it might deem just with any line of street railway operating across the bridges contemplated by the act if it should find it necessary to do so in order to effect the agreement of purchase or lease, Laws, 1895, p. 421, § 15, authorized the committee to enter into an original contract with a street railway company for the use of any of such bridges. The statute was not intended to restrict the committee to negotiations for the cancellation of existing rights.—*Multnomah County v. City Railway Co.*, 83.

BROTHELS.

Are Public Nuisances—Power of Equity to Prevent Building of—Special Injury to Complainant. See DISORDERLY HOUSE.

BURDEN OF PROOF. See EVIDENCE, 2, 3, 4.

CANCELLATION OF INSTRUMENTS. See VENDOR AND PURCHASER, 1, 2, 3.

CASES FROM THE OREGON REPORTS Applied, Approved, Cited, Distinguished, Followed and Overruled in this Volume. See OREGON CASES.

CATTLE.

Grazing on Unclosed Land. See TRESPASS.

CERTIFICATE

Of Judge to Bill of Exceptions is Conclusive. See APPEAL, 23.

CITY CHARTERS.

1898 CHARTER OF EUGENE.

Sections 90 and 96 of the charter of the City of Eugene (Laws, 1898, p. 273), construed.—*Huddleston v. City of Eugene*, 344.

1898 CHARTER OF PORTLAND.

Section 218 of the Portland charter, passed in 1898, recognized valid outstanding warrants as interest bearing.—*Shipley v. Hoyt*, 303.

CHATTEL MORTGAGES.

CHATTEL MORTGAGE AS EVIDENCE OF OWNERSHIP.

1. A chattel mortgage after default is admissible in evidence to support an averment of ownership and right of possession in the mortgagee in an action in replevin by the latter, since a chattel mortgagee then has a qualified ownership, and may prove it under an allegation of absolute ownership.—*Reinstein v. Roberts*, 87.

DESCRIPTION IN CHATTEL MORTGAGE—PAROL EVIDENCE.

2. A chattel mortgage on a crop of hops described as growing upon three parcels of land situated upon a part of a donation land claim which is referred to by the name of the claimant, the number of the notification and claim, and its township and range, is sufficiently definite in description, as between the parties thereto, to let in parol testimony to identify the property and prove the ownership, in view of the fact that under the Oregon donation laws a person can obtain but one gift of land from the government, and a partial description by metes and bounds may be regarded as surplusage.—*Reinstein v. Roberts*, 88.

PAROL EVIDENCE—CHATTEL MORTGAGE.

3. As between the mortgagor and mortgagee of personal property, and also as between the mortgagee and a third person who has succeeded to the mortgagor's interest with actual notice of the mortgage, parol evidence is admissible to identify the property intended to be covered thereby.—*Reinstein v. Roberts*, 88.

CHECKS.

Sending to Drawee Bank for Collection—Negligence. See *BANKS*.

Discussion of Time Allowed to Present. See *Kershaw v. Ladd*, pp. 379-381.

CITIES. Same as MUNICIPAL CORPORATIONS.

CLAIM AND DELIVERY. Same as REPLEVIN.

CLAIMS.

Presenting to Executor Does Not Affect Attachment. See *EXECUTORS*, 3.

Executor's Expenses Not Superior to Mortgage. See *EXECUTORS*, 2.

CODE CITATIONS. Same as STATUTES OF OREGON.

COLLATERAL ATTACK.

Controlling Rules in Collateral Attacks. See *JUDGMENTS*, 11, 12, 13.

Errors in Attachment Proceedings are not Material. See *JUDGMENTS*, 13.

Sufficiency of Return on Summons. See *SUMMONS*, 7.

Sufficiency of Certificate of Attachment. See *ATTACHMENT*, 7.

Sufficiency of Affidavit for Publication of Summons. See *SUMMONS*, 6.

Sufficiency of Order for Publishing Summons. See *SUMMONS*, 8.

Proof of Publishing and Mailing—Filing. See *SUMMONS*, 10, 11.

COLLATERAL SECURITY.

Effect on Surety of Releasing or Losing Security. See *PRIN. AND SUR.*, 2, 3.

COLOR OF TITLE.

Effect of Exclusive Adverse Holding Under. See *ADVERSE POSSESSION*, 4.

COMPENSATION

Of Executor Not Superior to Mortgage. See *EXECUTORS*, 2.

COMPETENCY of Evidence. See *EVIDENCE*, 5-11.

CONCLUSIVENESS

Of Trial Judge's Certificate to Bill of Exceptions. See *APPEAL*, 18.

CONSENT

Cannot Confer or Sustain Jurisdiction. See *EQUITY*, 1.

CONSIDERATION

For Undertaking to Collect Check. See *BANKS*, 1.

For Release of Right to a Lien. See *CONTRACTS*, 4.

CONSTITUTIONAL LAW.

CONSTRUCTION OF CONSTITUTION—APPOINTING POWER.

1. An act creating an office and providing that the incumbent thereof shall be elected by the legislature is not unconstitutional as an invasion of the Governor's prerogatives.—*State ex rel. v. Compson*, 25.

2. The power to fill an office may be exercised by either the executive or the legislature, in the absence of a constitutional prohibition.—*State ex rel. v. Compson*, 25.

CONSTITUTIONAL CONSTRUCTION.

3. The Constitution of Oregon, so far as it relates to the legislature, is a limitation rather than a grant of power, and that body may exercise any of the powers of sovereignty not expressly withheld. *State ex rel. v. Compson*, 25.

TENURE OF PUBLIC OFFICE—VACANCY.

4. In considering the tenure of public officials, the provisions of the Constitution of Oregon, Article XV, §§ 1 and 2, must be read together, and they mean that while no office can be created with a tenure of over four years, yet the incumbent may hold longer than that by reason of a failure to provide his successor. No vacancy ensues by such failure.—*State ex rel. v. Compson*, 25.

CONSTITUTIONAL CONSTRUCTION—PUBLIC OFFICERS.

5. The meaning of the expression "All officers" used in the Constitution of Oregon, Article XV, § 1, is not limited to those officers named or provided for in that document, or to such as are chosen by popular election, nor is it limited at all except as to members of the legislature.—*State ex rel. v. Compson*, 25.

6. The word "elected" in the Constitution of Oregon, Article XV, § 1, providing that public officers shall remain in office until their successors are "elected and qualified" does not refer solely to a selection by the people, but includes a choice by the legislative assembly.—*State ex rel. v. Compson*, 25.

OFFICERS SELECTED BY LEGISLATURES.

7. The Declaration of Or. Const., Art. XV, § 2, that the legislature shall not create any office the tenure of which shall exceed four years, is not violated by the provisions of Hill's Ann. Laws, §§ 4003 *et seq.* that railroad commissioners who are originally appointed by the legislature for two years shall hold until their successors are elected and qualified, since the provision of Article XV, § 1 of the Constitution, that all officers except members of the legislative assembly shall hold their offices until their successors are elected and qualified, applies to all persons chosen to fill public offices, whether by the people at large, by the legislature, or by the Governor.—*State ex rel. v. Compson*, 25.

VALIDATING VOID CONTRACT BY SUBSEQUENT LEGISLATION.

8. No statutory ratification or subsequent legislation can make valid a contract that was null and void at its inception; thus, where a mortgage is absolutely void, because it covers land in more than one county, its validity cannot be cured by subsequent legislation repealing the provision which prohibited such a mortgage, or consolidating counties in such a way as to bring the lands mortgaged within one county.—*Denny v. McCoun*, 48.

IMPAIRING OBLIGATION OF CONTRACT—COUNTY ORDER.

9. The implied contract to pay interest arising from the nonpayment and indorsement of a county order is protected against impairment by Article I, Section 10, of the United States Constitution.—*Seton v. Hoyt*, 286.

CONSTITUTION OF OREGON.

Article I.	{	Section 18	<i>Huddleston v. City of Eugene</i> , 343.
		Section 32	<i>Dayton v. Multnomah County</i> , 239.
Article II.	{	Section 15	
Article IV.	{	Section 30	<i>State ex rel. v. Compson</i> , 33.
Article V.	{	Section 5	
Article IX.	{	Section 1	<i>Dayton v. Multnomah County</i> , 239.
Article XV.	{	Section 1	<i>State ex rel. v. Compson</i> , 25.
		Section 2	

CONSTITUTION OF THE UNITED STATES.

Article I, Section 10, *Seton v. Hoyt*, 286.

CONSTRUCTION OF STATUTES. Same as STATUTES.

CONSTRUCTIVE FRAUD.

Unintentional Misrepresentations May Amount to. See FRAUD, 1.

CONSTRUCTIVE NOTICE.

Occupation as Notice to Purchaser of Occupant's Rights. See NOTICE.

CONTRACTS.

BRIDGE COMMITTEE OF PORTLAND—POWER TO CONTRACT.

1. The statute under which the Bridge Committee of Portland acquired the Morrison Street Bridge (Laws, 1895, p. 321) was not intended to restrict the committee to the procuring of existing rights, but conferred on it power to contract with existing street railway lines for the use of any of the bridges. Such a contract being within the power of the committee, it cannot be set aside or annulled by the successor of the committee.—*Multnomah County v. City Railway Co.*, 53.

CURING VOID CONTRACT BY SUBSEQUENT LEGISLATION.

2. No statutory ratification or subsequent legislation can make valid a contract that was null and void at its inception.—*Denny v. McCown*, 48.

RESCISSION OF CONTRACT—DUTY OF INJURED PARTY.—

3. A vendee desiring to rescind a contract on the ground of fraud, accident, or mistake, must proceed promptly, on the discovery of the alleged infirmity, to place the other party *in statu quo* by returning or offering to return that which he has received.—*Vaughn v. Smith*, 54.

CONSIDERATION—UNILATERAL CONTRACT.

4. A payment by the owner of a building to his contractor in reliance upon a waiver by a materialman of his right to a mechanic's lien, and a like payment by the contractor to the materialman, pursuant to an understanding to that effect when the waiver was signed, is a sufficient consideration to support the waiver, although it did not by its terms require any payment by the contractor.—*Hughes v. Lansing*, 118.

INDEFINITE CONTRACT.

5. The consideration for an agreement to convey lands was the payment of a sum of money, and the delivery on demand, "at the mill," of lumber which the vendor intended to use in a house situated not far from the premises in question. The lumber had not yet been manufactured, and the vendee owned a sawmill at a distance, from which it could be transported only at considerable expense to the place where the vendor intended to use it. It was the intention of the parties that the vendee should erect a sawmill on the lands purchased. The testimony as to the mill at which the parties intended the delivery to be made was conflicting. *Held*, that the new sawmill was the one at which the tender of the lumber should have been made.—*David v. Anderson*, 439.

INTEREST ON CONTRACTS.

6. Contracts stipulating for interest will draw interest at the agreed rate, or the statutory rate prevailing at the date of the instrument, until final payment, without regard to any intermediate change in the law.—*Seton v. Hoyt*, 236; *Shipley v. Hacheney*, 303.

INTEREST ON COUNTY ORDERS—IMPLIED CONTRACT.

7. Under Hill's Ann. Laws, § 2465, providing that the county treasurer shall pay all orders of the county clerk when presented, if there is money in the treasury for that purpose, but if not, he shall indorse thereon, "Not paid for want of funds," which shall entitle such order thenceforth to draw legal interest, two implied contracts are engendered, viz.: that the holder of the order will wait for payment until sufficient money has been accumulated in the usual course of public business to pay the claim, and that the county will pay the legal rate of interest upon the order.—*Seton v. Hoyt*, 236.

CONTRACT TO PAY INTEREST—SUBSEQUENT LEGISLATION.

8. The presentation of a warrant, and its indorsement as prescribed by an ordinance, constitute a contract between the city and the warrant holder entitling the latter to the stated rate of interest until the warrant is paid, or notice given to him of sufficient funds to pay it, which is not affected by subsequent legislation changing the rate of interest on similar demands.—*Shipley v. Hacheney*, 303.

IMPAIRING OBLIGATION OF CONTRACT—COUNTY ORDER.

9. The implied contract to pay interest arising from the nonpayment and indorsement of a city or county order is protected against impairment by the United States Constitution, Article I, § 10.—*Seton v. Hoyt*, 236; *Shipley v. Hacheney*, 303.

RATIFICATION OF CONTRACT.

10. Portland City Charter, § 218, adopted October 22, 1896, authorizing the issuance of bonds to retire outstanding warrants against the city's general fund, which warrants it declares valid and binding obligations against the city, and requires the treasurer to pay out of the proceeds of such bonds, is a recognition

and ratification of the city's obligation to pay valid outstanding warrants against the general fund, and interest thereon at eight per cent., as provided for by an ordinance passed under prior charter authority, in spite of the act of October 14, 1898 (Laws, 1898, Sp. Sess. p. 15), reducing the legal rate of interest from eight to six per cent.—*Shipley v. Hachaney*, 303.

AGREEMENT TO MODIFY CONTRACT—EVIDENCE.

11. An agreement to modify a prior agreement must be established by clear and satisfactory evidence.—*Boyes v. Ramsden*, 253.

CONSTRUCTION OF CONTRACT—HIRING AT WILL.

12. A contract of employment for a year containing an agreement that "this contract shall be renewed during the strict performance of its conditions," is a contract at will which may be terminated by either party at his pleasure, after the expiration of the stated period.—*McKinney v. Statesman Publishing Co.*, 500.

CONSTRUCTION OF CONTRACT—RENEWAL CLAUSE.

13. Such a contract, however, imposes on the employer the obligation to renew the contract on the same terms for a second year.—*McKinney v. Statesman Publishing Company*, 500.

CONSTRUCTION OF CONTRACT—"SETTLEMENT."

14. The word "settlement," as used in a contract requiring a collector to pay in moneys as he collects, and make a complete settlement on certain days, means payment, and not a computation of accounts.—*McKinney v. Statesman Publishing Company*, 500.

LIABILITY OF AGENT ON UNAUTHORIZED CONTRACT.

15. An agent is personally liable to an action for damages for breach of an implied warranty, where he goes beyond his authority in making a contract in the name of his principal, and the latter repudiates it.—*Cochran v. Baker*, 555.

CONTRACTS FOR THE BENEFIT OF THIRD PERSONS—NOVATION.

16. Where one has received from another some fund or property, in consideration of which he has made a promise to or entered into an undertaking with such other for the benefit of a third person, an action thereon may be maintained by such person, though not a party to the transaction.—*Feldman v. McGuire*, 309.

PROMISE TO PAY ANOTHER'S DEBT.

17. A promise to pay another's debt in consideration of the receipt of a fund for that purpose is not an agreement within the statute of frauds, and may be proved by parol.—*Feldman v. McGuire*, 309.

18. Whether one who has promised to pay debts of another has received money or property in consideration of the promise is a controlling circumstance in the transaction.—*Feldman v. McGuire*, 309.

19. The liability of one who undertakes to pay the debts of another is not affected by the fact that the debtor remains liable to the creditor.—*Feldman v. McGuire*, 309.

20. An agreement to pay the debts of another, in consideration of a conveyance of land, does not come within the statute of frauds where the contract as to the property is completely executed.—*Feldman v. McGuire*, 309.

RIGHTS OF GRANTEE TO CONTRACT FOR SALE.

21. A bond for a deed transfers to the obligee an equitable interest in the land agreed to be conveyed, the legal title remaining with the obligor in trust for the purchaser.—*Ambrose v. Huntington*, 484.

22. Unless particularly specified, a bond for a deed does not entitle the obligee to possession, and if he takes possession without consent he is a trespasser.—*Ambrose v. Huntington*, 484.

RENT FOR POSSESSION UNDER A CONTRACT.

23. Where the obligee in a bond for a deed takes possession, the payment of interest on deferred installments of the purchase price is usually sufficient compensation for the use of the premises until the maturity of the debt under the bond.—*Sievers v. Brown*, 454.

EFFECT OF REFUSAL TO PAY.

24. The relation between a vendor and a vendee in possession becomes that of landlord and tenant, on the vendee's refusal to pay installments of the price according to his contract.—*Sievers v. Brown*, 454.

CONTRACTS.

BRIDGE COMMITTEE OF PORTLAND—POWER TO CONTRACT.

1. The statute under which the Bridge Committee of Portland acquired the Morrison Street Bridge (Laws, 1895, p. 421) was not intended to restrict the committee to the procuring of existing rights, but conferred on it power to contract with existing street railway lines for the use of any of the bridges. Such a contract being within the power of the committee, it cannot be set aside or annulled by the successor of the committee.—*Multnomah County v. City Railway Co.*, 93.

CURING VOID CONTRACT BY SUBSEQUENT LEGISLATION.

2. No statutory ratification or subsequent legislation can make valid a contract that was null and void at its inception.—*Denny v. McCown*, 48.

RESCISSION OF CONTRACT—DUTY OF INJURED PARTY.—

3. A vendee desiring to rescind a contract on the ground of fraud, accident, or mistake, must proceed promptly, on the discovery of the alleged infirmity, to place the other party *in statu quo* by returning or offering to return that which he has received.—*Vaughn v. Smith*, 54.

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24. The relation between a vendor and a vendee in possession becomes that of landlord and tenant, on the vendee's refusal to pay installments of the price according to his contract.—*Sievers v. Brown*, 454.

FORFEITURE UNDER CONTRACT TO CONVEY.

25. The obligor in a bond for a deed cannot demand compliance with the contract by the obligee, or declare a forfeiture for a breach thereof, until he is himself prepared to comply with its terms, and has tendered a deed.—*Stevens v. Brown*, 454.

TERMINATION OF TENANCY.

26. The tenancy at will initiated between a vendor and vendee of real property by the failure of the latter to carry out the contract of sale is terminated by a tender of compliance therewith by the vendor, coupled with the ability to make good the tender. *Stevens v. Brown*, 454.

RIGHT TO EMBLEMENTS.

27. A vendee who is in possession of real property as a tenant at will under a bond for a deed, the terms of which he has broken, is entitled to the crops sown thereon before such tenancy was ended, but not to such as were sown after notice to quit.—*Stevens v. Brown*, 454.

WHEN HOLDING UNDER CONTRACT BECOMES ADVERSE.

28. Where a vendee has gone into the possession of land under a contract to purchase, his holding is adverse to the vendor from the time he complies with his part of the agreement, and the same rule applies to the state as to a natural person.—*Ambrose v. Huntington*, 435.

CONTRIBUTORY NEGLIGENCE.

Duty to Stop, Look and Listen for Approaching Train. See NEGLIGENCE, 1, 2.

CONVEYANCE.

Interests and Rights Under Bond for Deed. See VEND. AND PUR., 5-13.

CORRECTION

Of Bill of Exceptions After Filing an Appeal. See APPEAL, 22.

Of Decree After Appeal is Perfected. See APPEAL, 26.

Of Transcript After Filing in Supreme Court. See APPEAL, 14.

Of Return on Writ to Conform to the Truth. See SUMMONS, 1.

CORPORATIONS.

ATTACK ON ORGANIZATION OF PUBLIC CORPORATIONS.

It is contrary to public policy to permit private persons to attack the legality of public or governmental corporations that are exercising appropriate powers after organizing under color of title.—*School District v. School District*, 97.

COSTS.

PAYMENT OF COSTS.

1. Under the peculiar facts in this case, the defendant, who is appellant, should recover costs of the appeal, notwithstanding he failed to establish his claim to the property involved.—*Small v. Lutz*, 131.

RIGHT TO RECOVER COSTS.

2. The expenses incident to a trial cannot be recovered from the adverse party, except under a statute.—*State ex rel. v. Estes*, 197.

MEDICAL BOARD—COSTS.

3. Costs are not recoverable by defendant in an action begun before the Board of Medical Examiners to revoke a physician's license, where the case was appealed by the defendant to the circuit court and reversed, since the statute makes no provision therefor.—*State ex rel. v. Estes*, 197.

COSTS OF APPEAL—PRINTING UNNECESSARY BRIEF.

4. After a decision on appeal the losing party may be heard on an objection to paying for the cost of printing in a brief matter that was unnecessary.—*White v. White*, 142.

DISCRETION AS TO ALLOWING.

5. Costs and disbursements, as a general rule, should be allowed the prevailing party in a suit in equity as well as in an action at law, but the trial courts are given a discretion in the matter by section 554 of our statutes, which will not be interfered with on appeal except for an abuse.—*Dinnick v. Rosenfeld*, 101.

COUNTIES.

LIABILITY FOR INTEREST.

1. A county is only an arm or agent of the state, and consequently is not liable for interest under a general statute regulating that subject, but only when expressly named, so that a county is not liable for interest under Section 3587, Hill's Ann. Laws, it not being mentioned therein.—*Seton v. Hoyt*, 266.

INTEREST ON COUNTY ORDERS—IMPLIED CONTRACT.

2. Under Hill's Ann. Laws, § 2465, providing that the county treasurer shall pay all orders of the county clerk when presented, if there is money in the treasury for that purpose, but if not, he shall indorse thereon, "Not paid for want of funds," which shall entitle such order thenceforth to draw legal interest, two implied contracts are engendered, viz.: that the holder of the order will wait for payment until sufficient money has been accumulated in the usual course of public business to pay the claim, and that the county will pay the legal rate of interest upon the order.—*Seton v. Hoyt*, 266.

RATE OF INTEREST ON COUNTY ORDERS.

3. The rate of interest on county warrants indorsed "Not paid for want of funds" is the rate prevailing at the date of such indorsement, and cannot afterward be reduced.—*Seton v. Hoyt*, 266.

IMPAIRING OBLIGATION OF CONTRACT—COUNTY ORDER.

4. The implied contract to pay interest arising from the nonpayment and indorsement of a county order is protected against impairment by Article I, Section 10 of the United States Constitution.—*Seton v. Hoyt*, 266.

5. Act of October 14, 1898, changing the rate of interest, is not extended to outstanding warrants by the provision that, "Inasmuch as the counties * * * are paying interest on their county warrants at the rate of eight per cent. per annum, thereby imposing a useless burden upon the taxpayers, this act shall become a law upon receiving the signature of the Governor."—*Seton v. Hoyt*, 266.

COUNTY ROADS.

Changing to City Streets—Not Thereby Subjected to Additional Servitude—Compensation. See HIGHWAYS, 1.

COUNTY SCHOOL SUPERINTENDENT.

Power to Convey or Contract to Sell School Land. See SCHOOLS, 3.

COURTS.

JUDICIAL NOTICE.

1. The courts cannot take judicial knowledge that values have been unreasonably increased or diminished under a system adopted for ultimate equalization.—*Dayton v. Multnomah County*, 239.

REINSTATEMENT OF PHYSICIAN—POWER OF COURT.

2. That part of a judgment of the circuit court in an action appealed from the Board of Medical Examiners revoking a physician's license which adjudges that the defendant is entitled to practice medicine and surgery, as if the verdict and decision of the board had not been rendered, is erroneous in view of the statutory provision (Laws, 1895, p. 61, § 6), that if the circuit court reverses the action of the board and no appeal is taken to the supreme court within sixty days, the medical board shall immediately reinstate defendant's name upon the records of the board. The proper course is for the circuit court to direct the board to reinstate the accused.—*State ex rel. v. Estes*, 198.

CIRCUIT COURT—JUDGMENT ON DISMISSING APPEAL.

3. The circuit court, in dismissing an appeal from a justice's court, cannot render judgment for appellee.—*Whipple v. Southern Pacific Company*, 371.

RIGHT TO ENTERTAIN APPEAL FROM DEFAULT JUDGMENT.

4. Laws, 1893, p. 38, § 6, authorizing the circuit court, on appeal from a justice's court, to disregard irregularities and imperfections in matters of form as to the proceedings below, does not modify Section 2117, Hill's Ann. Laws, which prohibits an appeal from a justice's judgment given for want of an answer, since, there being no answer, there is no "matter of form" to be disregarded.—*Whipple v. Southern Pacific Company*, 370.

DUTY OF COUNTY COURT WHEN WILL IS PROPOUNDED.

5. It is the duty of the county court to probate a will with convenient speed after it has been presented, and no one is, as a matter of right, entitled to notice of such proceeding.—*Malone v. Cornelius*, 192.

RULES OF COURT.

6. An objection to an abstract because it is not indexed should be made with reasonable promptness, it is too late after the opposite side has filed a brief on the merits of the case.—*Whipple v. Southern Pacific Company*, 370.

MOTION TO STRIKE PORTION OF BRIEF.

7. Before an appeal is determined a motion to expunge a portion of the adverse party's brief will be denied, where it is not claimed that the matter assailed is of such a nature as to require prompt action to protect the dignity of the court, though such a motion may be considered on the question of costs.—*White v. White*, 142.

REMITTITUR—POWER OF SUPREME COURT TO CORRECT JUDGMENT.

8. Where there is an erroneous judgment at law entered on undisputed facts, the supreme court may remand the case with directions to enter a particular judgment; or, if a judgment is manifestly excessive, by an inspection of the record, and the amount thereof is apparent, the court may affirm the judgment on penalty of a new trial, unless the excess is remitted.—*Cochran v. Baker*, 555.

CRIMINAL LAW.

EVIDENCE NOT CONNECTED WITH DEFENDANT.

In a proceeding to revoke a physician's license for unprofessional conduct, testimony tending to show that one of defendant's patients had suffered an abortion was properly refused when counsel stated that he doubted if defendant could be connected with the offence.—*State ex rel. v. Estes*, 197.

CRITICISED CASES. Same as OREGON CASES.

CROPS.

VENDOR AND VENDEE—EMBLEMENTS.

A vendee who is in possession of real property as a tenant at will under a bond for a deed, the terms of which he has broken, is entitled to the crops sown thereon before such tenancy was ended, but not to such as were sown after notice to quit.—*Stevens v. Brown*, 454.

CROSSINGS.

Duty to Stop and Listen for Railroad Train. See NEGLIGENCE, 1, 2.

CRUELTY.

Conduct Here Shown Does Not Amount to Cruelty. See DIVORCE, 1.

CURATIVE ACT

Cannot Validate Absolutely Void Contract. See STATUTES, 3.

CUSTOM AND USAGE.

BANKS—REASONABLENESS OF CUSTOM.

1. A custom of banks to send checks direct to the drawee banks for collection and return is not unreasonable, at least as applied to the collection of a plain, undorsed check.—*Kershaw v. Ladd*, 376.

PRESUMPTION OF REASONABLENESS.

2. It will always be presumed that a custom is reasonable when it appears to prevail in a given business.—*Kershaw v. Ladd*, 376.

DEATH

Of Party Before Appeal. See ABATEMENT AND REVIVAL, 3.

Of Party After Appeal. See ABATEMENT AND REVIVAL, 1, 2.

DECEDENTS' ESTATES. Same as EXECUTORS AND ADMINISTRATORS.

DECLARATIONS AGAINST INTEREST. See EVIDENCE, 13.

DEED.

DELIVERY—CONTROL OVER THE PREMISES.

1. The paramount idea respecting the delivery of a deed is that the control over the instrument shall at once pass to the grantee, but control over the premises is not an element necessary to the vesting of title.—*White v. White*, 141.

CONTROL OF DEED AS AFFECTING DELIVERY.

2. An instruction that if the grantor in his lifetime actually delivered the deed in question to the grantee, with the intention of investing her with the title, it was sufficient to establish her title, is not susceptible of the construction that if the grantor intended to invest the title at some future time, or at his death, the requirements of a good delivery had been fulfilled, where the context shows that the court had reference to a manual transfer of the deed, and the jury had already been instructed concerning the necessity of a present intention to pass the title.—*White v. White*, 141.

3. An instruction that if the jury do not find that there was an actual manual delivery of the deed they shall inquire into the circumstances of its execution and as to what the grantor did and said, in order to ascertain his intention in the premises, and that if the grantor, after executing and acknowledging it, either by acts or words, or both, expressed his intention to part with it or surrender its custody, there was a good delivery, is not subject to the criticism that a simple handing of the deed by the grantor to the grantee constituted a good delivery.—*White v. White*, 142.

RECORD AS AFFECTING DELIVERY.

4. An instruction that the validity of a deed, the delivery of which was the question to be determined, is not affected by its being left unrecorded, is not subject to the criticism that it withdraws from the jury the fact of the nonrecording as a circumstance in determining the question of delivery, where the jury were given to understand from the whole charge that the nonrecording was a circumstance which they might consider with other facts in the case upon the question whether there was a delivery.—*White v. White*, 142.

RETAINING POSSESSION OF GRANTED LAND.

5. An instruction that if it were understood between the parties to a deed that the grantor should hold possession during his lifetime it would not prevent the title passing, is not subject to the criticism that it withdraws from the jury the effect of such agreement as bearing upon the question of delivery, where it is apparent that its purpose was merely to combat the theory that the passing of dominion over the premises was necessary to a good delivery.—*White v. White*, 142.

PRESUMPTION AS TO INTEREST DEEDED.

6. The grantor in a deed of part of the land owned by him will be presumed to have intended to convey and the grantee to have intended to take the premises as they openly and visibly appeared at the time the sale was consummated, where the intention of the parties is not discoverable from an inspection of the deed, and proof of actual knowledge of the contracting parties with reference to the physical condition of the premises cannot be obtained; but where the actual intent of the parties is shown it will control.—*North Powder Milling Company v. Coughanour*, 9.

AGREEMENT IN DEED TO PAY MORTGAGE.

7. A grantee of mortgaged property who accepts a deed therefor reciting that he assumes and agrees to pay the mortgage debt is not personally liable therefor unless his immediate grantor was so bound.—*Young Men's Association v. Croft*, 106; *Portland Trust Company v. Nunn*, 166.

EFFECT OF DEED TO ANOTHER'S LAND.

8. A deed to land as to which an adverse possession against the grantor has ripened into title is ineffectual for any purpose.—*Ambrose v. Huntington*, 494.

POWER OF EQUITY TO COMPEL EXECUTION OF DEED.

9. Equity can compel the delivery of a deed for property that has been paid for, or adjudge that the decree declaring the rights of the plaintiff stand as and for such deed; replevin would not be an adequate remedy where the deed had been destroyed or never executed.—*Boyes v. Ramsden*, 253.

DEFAULT.

Necessity of Answer in Justice's Court. See JUSTICE OF THE PEACE, 5.

Default Judgment by Justice Not Appealable. See JUST. OF THE PEACE, 7.

Opening Default is Discretionary. See TRIAL, 2, 3.

DEFECT OF PARTIES.

Waiver of by not Pleading in Answer. See PLEADING, 8.

This Point Cannot be First Urged on Appeal. See APPEAL, 4.

DEFINITIONS.

"All Officers"—"Assume"—"Elected"—"Forthwith"—"Pilot"—"Reasonable Charges"—"Settlement"—"Void." See WORDS AND PHRASES.

DELAY

When Amounting to Laches is Fatal. See EQUITY, 10, 11.

DELIVERY

Of Deed—Control Over the Property Transferred—Recording—Possession of the Instrument. See DEEDS, 1-5.

DEMAND For Payment of Check. See *Kershaw v. Ladd*, 380, 381.

DEPOSITIONS.

TAKING DEPOSITION OF ADVERSE PARTY BEFORE TRIAL.

Under Hill's Ann. Laws, § 814, Subd. 1, and Section 823, authorizing the taking of the deposition of an adverse party previous to the trial before an officer authorized to administer oaths, on the giving of a three-days' notice, unless the court prescribes a shorter time, it is not necessary that the officer taking the deposition should be commissioned by the court.—*Wheeler v. Burckhardt*, 501.

DEPOSITS of Trust Funds. See BANKS, 5.

DIRECTING VERDICT.

Duty of Judge Where Evidence is Uncontradicted. See TRIAL, 6.

DISCRETION OF COURT.

Allowance of Costs in Equity Suits. See COSTS, 5.

In Opening Default Judgment. See TRIAL, 3.

DISORDERLY HOUSE.

INJUNCTION—BAWDY HOUSE.

1. A house of ill fame is a public nuisance, wherever it may be situated, and its continuance may be enjoined by any property owner who can show a special injury.—*Blagen v. Smith*, 384.

2. Equity will enjoin the leasing of houses for brothels when they are so situated with reference to complainant's business property that the occupants of the latter are subjected to disgraceful sights and sounds, for the owner in such a case suffers a special injury in the enjoyment of his property.—*Blagen v. Smith*, 385.

DIVERSION OF WATER. See WATERS, 3.

DIVORCE.

CRUELTY.

1. It is no ground for divorce that plaintiff was unable to get along with defendant's son by a former marriage, who was impudent, saucy, and sometimes abusive, to her, and that defendant refused to send away his son when plaintiff said one of them must go, and that on her returning, and attempting to enter the house, she was prevented by the son from doing so; the conduct of the son not having been encouraged or approved by defendant.—*Nickerson v. Nickerson*, 1.

DEATH OF HUSBAND PENDING APPEAL—ABATEMENT OF SUIT.

2. The death of the husband pending an appeal by him from a decree of divorce which determines the property rights of the parties, does not abate the suit.—*Nickerson v. Nickerson*, 1.

DRAFT.

Time Allowed for Presenting.—See *Kershaw v. Ladd*, 380, 381.

Sending to Drawee for Collection.—See *Kershaw v. Ladd*, 381-382.

EASEMENTS.

USE OF LAND IN PUBLIC STREETS.

1. In view of Section 4184, Hill's Ann. Laws, providing that when a street is vacated the land theretofore so used shall vest in the abutting owners, the public has only an easement in such land.—*Huddleston v. City of Eugene*, 343.

SERVITUDES ON LAND USED FOR STREETS AND HIGHWAYS.

2. The additional use imposed on ground by using it as a street rather than as a country road, laying gas, water and sewer pipes under its surface, or laying pavements thereon, do not constitute a servitude on either the road or the adjoining property beyond that imposed by its use as a country highway.—*Huddleston v. City of Eugene*, 343, 344.

ELECTIONS.

ELECTIONS—CONSTRUCTION OF LAW.

1. The provisions of the election act generally known as the Australian Ballot Law relating to the space in which the marking of the ballots shall be done are mandatory, although there is no provision rendering void a ballot not marked in the prescribed manner.—*Van Winkle v. Crabtree*, 462.

SPACE FOR DISTINGUISHING MARK.

2. Where an election law requires the elector to indicate his choice by a mark, the ballot should be counted if the mark is made anywhere in the space occupied by the name of the chosen candidate, so long as it does not obliterate such name.—*Van Winkle v. Crabtree*, 462.

VOTING MARKS ON BALLOTS.

3. Where an election law requires the voter to place a mark opposite the name of the candidate voted for, but does not define the character of such mark, a ballot should not be counted for either candidate where it contains a cross at the left of the name of one candidate, and at the left of the name of a rival candidate a single downward slanting stroke of the pencil, from left to right, crossed by a waving or curved line.—*Van Winkle v. Crabtree*, 462.

4. Under such an act, ballots marked opposite the names of all the candidates but one for a certain office, and not having any mark opposite his name, cannot be counted for the latter.—*Van Winkle v. Crabtree*, 462.

5. In view of such an election law, ballots having pencil lines drawn through the names of all the candidates for an office except one cannot be counted for the latter.—*Van Winkle v. Crabtree*, 462.

6. Where an elector has, with one exception, voted for the candidates of one party, and in that one instance has placed a mark on the line dividing the space between two candidates, the center of the mark being slightly inside the space of the candidate of the party for which he has cast his other votes, the ballot is properly counted for the latter; since, considering the tendency of electors to vote a partisan ticket, the elector's intention to vote for his party's candidate can be ascertained therefrom.—*Van Winkle v. Crabtree*, 462.

7. Under the Oregon law, a ballot should not be counted for a candidate at the left of whose name appears a cross, where two pencil lines are drawn through his name indicating that the voter had changed his mind after making the cross.—*Van Winkle v. Crabtree*, 462.

8. Ballots bearing any mark in a given space should be counted for the candidate in whose space the mark is made, though parts of such marks extend into other spaces.—*Van Winkle v. Crabtree*, 463.

9. Where an elector voted for the candidates of one party, with one exception, and the mark opposite that party's candidate for one office extended through the space reserved for his name, both above into the space containing the name of the office, and below into the space reserved for another candidate's name, the ballot is properly counted for the former, the elector's intention to vote for him being ascertainable therefrom.—*Van Winkle v. Crabtree*, 463.

10. Under an election law which provides for indicating the voter's choice by a mark in the space where the candidate's name is printed, or by writing the name of the chosen person if it does not appear on the printed sheet, a ballot having the names of all the candidates for a certain office marked out, and then one of such names written in a blank space left for extra names, cannot be counted at all; nor can a ballot having a line drawn through the name of each candidate of one party.—*Van Winkle v. Crabtree*, 463.

DISTINGUISHING MARK RENDERING BALLOT VOID.

11. Under Laws, 1891, p. 8, § 67, as amended by Laws, 1895, p. 68 (Hill's Ann. Laws, p. 1169), prescribing a punishment for electors who place a distinguishing mark on their ballots so that the same may be identified, a ballot having the mark "O K" written on a blank space, beneath a set of candidates, is void.—*Van Winkle v. Crabtree*, 463.

12. Ballots having the words "voted for" written thereon after the name of one of the candidates, in addition to the required voting mark, carry a "distinguishing mark," which renders them void under the election law.—*Van Winkle v. Crabtree*, 463.

DISTINGUISHING MARK NOT RENDERING BALLOT VOID.

13. A ballot on which an elector wrote in the space appropriated to candidates the name of a person for whom he desired to vote (such person not being a listed candidate) should not be rejected as bearing a distinguishing mark, under section 67 of the election law providing a punishment for voters who thus mutilate their ballots, notwithstanding it is possible that the name so written might afford a means of identifying the voter.—*Van Winkle v. Crabtree*, 463.

ELECTION CONTESTS—TESTIMONY OF ILLEGAL VOTERS.

14. The testimony of illegal voters as to the person for whom they voted is admissible in an election contest, where they voted in the belief that they had the right to do so; and the ballots cast by such persons may be deducted from those credited to their candidates.—*Van Winkle v. Crabtree*, 462.

ELECTION CONTESTS—QUESTIONS REVIEWED ON APPEAL.

15. An appeal to the supreme court from a judgment upon the trial of an election contest does not bring up the cause for trial *de novo*, but the questions presented for review are the conclusions of law from the findings of fact.—*Van Winkle v. Crabtree*, 463.

ELECTION CONTEST—REVIEW—HARMLESS ERROR.

16. A judgment in an election contest will not be reversed because the court erroneously counted a void ballot for respondent, where it also counted void ballots for appellant, so that in spite of its error, the judgment is correct; and this even where respondent did not appeal, since it is the duty of the appellate court to declare the law applicable to the facts, and correct any error apparent on the record, whether it is complained of or not.—*Van Winkle v. Crabtree*, 463.

PRESUMPTION FROM BALLOT AS TO RESIDENCE OF VOTER.

17. There is no presumption that a person was not a resident of the precinct where he voted because he did not vote for precinct officers, though his ballot was endorsed "State, county, and dis't."—*Van Winkle v. Crabtree*, 463.

EMBLEMMENTS.

Ownership of Crops Sown Before Notice to Quit. See *VEND. AND PUR.*, 12.

EMINENT DOMAIN.

Prescribed proceedings for condemning private property for public use must always be strictly pursued.—*Huddleston v. City of Eugene*, 344.

EQUALIZATION OF TAXES. See *TAXES AND TAXATION.*

EQUITY.

JURISDICTION OF EQUITY—CONSENT OF PARTIES.

1. A bill in equity should be dismissed where the subject-matter of the litigation is entirely without the pale of equity, though both parties consent to a trial on the merits.—*Small v. Lutz*, 131.

ORDER OPERATING AS AN EQUITABLE ASSIGNMENT.

2. To give an unaccepted draft or order the effect of an equitable assignment of a fund, it must, by its terms, be drawn upon that fund.—*Erickson v. Inman*, 44.

REMEDY AT LAW—JURISDICTION OF EQUITY.

3. The rule that a court of equity obtaining jurisdiction of a cause for one purpose will retain it until complete justice is done has no application to a suit to foreclose a void mortgage or trust deed, so as to authorize the court to award a money judgment on the note it was intended to secure.—*Denny v. McCown*, 48.

NUISANCE—JURISDICTION OF EQUITY.

4. Equity has jurisdiction to restrain existing or threatened public nuisances by injunction at the suit of a private person who suffers therefrom a special and peculiar injury distinct from that suffered by him in common with the public at large.—*Blagen v. Smith*, 394.

5. Hill's Ann. Laws, § 333, providing a remedy at law for a private nuisance by an action for damages and an order to abate the nuisance, is not exclusive where immediate relief is demanded, since section 380 provides that the enforcement or protection of a private right, or the prevention of, or redress for, an injury thereto, shall be obtained by a suit in equity in all cases where there is not a plain, adequate, and complete remedy at law.—*Blagen v. Smith*, 394.

INJUNCTION—BAWDY HOUSE.

6. A house of ill fame is a public nuisance, wherever it may be situated, and its continuance may be enjoined by any property owner who can show a special injury.—*Blagen v. Smith*, 394.

7. Equity will enjoin the leasing of houses for brothels when they are so situated with reference to complainant's business property that the occupants of the latter are subjected to disgraceful sights and sounds, for the owner in such a case suffers a special injury in the enjoyment of his property.—*Blagen v. Smith*, 395.

INJUNCTION—TENDER OF TAX.

8. A suit to enjoin the collection of part of a tax cannot be entertained until there has been a payment or tender of the amount admitted to be legal.—*Dayton v. Multnomah County*, 239.

POWER TO COMPEL DELIVERY OF A DEED.

9. Equity can compel the delivery of a deed for property that has been paid for, or adjudge that the decree declaring the rights of the plaintiff stand as and for such deed; replevin would not be an adequate remedy where the deed had been destroyed or never executed.—*Boyes v. Ramsden*, 253.

LIMITATION OF ACTIONS—LACHES—EQUITY.

10. While the statute of limitations is not a defense in equity, still the claimant must have exercised reasonable diligence in asserting his claim after ascertaining the fraud complained of, or after learning of facts which would put a person of ordinary intelligence on inquiry.—*Loomis v. Rosenthal*, 585.

LACHES—STALE DEMAND.

11. The purchaser of land at an administrator's sale held notorious and exclusive possession of it nineteen years, and fifteen years after the youngest heir became of age. The heirs lived in the same neighborhood, knew their father had owned the land, and visited the purchaser's family, and were notified of the administrator's sale. The purchaser cut the timber, erected costly buildings, and contributed a large sum towards bringing an electric railway from the city to the premises, and the land rapidly increased in value. The deeds showing the transactions were of record. Held, that the heirs were guilty of laches preventing their recovery of the land, notwithstanding no notice of the appointment of the administrator was served on them.—*Loomis v. Rosenthal*, 585.

ESTOPPEL.

ESTOPPEL BY STIPULATION—TRIAL.

1. A stipulation between the parties to an action at law in which a cross bill in equity was interposed, that the suit in equity shall proceed to trial, and that the findings of fact shall be filed in the law action, and judgment entered accordingly, is of no effect where the court, of its own motion, dismissed the cross bill for want of jurisdiction; and the law action must then proceed as if the cross bill had never been filed or the stipulation made.—*Small v. Lutz*, 131.

WHARVES—TIDE LAND—ESTOPPEL.

2. An owner of upland bordering on a navigable stream, having a right to build a wharf at deep water in front of his property, who transfers his wharf privilege, is thereby estopped from objecting to the maintenance of a wharf built on the faith of his conveyance, even though he subsequently acquires from the state the tide land between the upland and the wharf.—*Welch v. Oregon Railway and Navigation Company*, 447.

ESTOPPEL TO CLAIM REMISSION OF TAXES.

3. A taxpayer who personally appears before the board of equalization and makes oath that she is the owner and holder of certain property, is thereby precluded from having the taxes thereon remitted on her bare subsequent affidavit that she is not the owner.—*Kirkwood v. Ford*, 552.

DECREE NOT DECIDING PRESENT POINT.

4. A decree that deeds claimed to be fraudulent were supported by the agreement of the grantee to pay certain creditors of the grantor, does not estop another creditor from asserting that such grantee agreed to pay his claim, since defendant may have agreed to assume more of his grantor's indebtedness than he found necessary to prove to sustain his defense in the prior proceeding.—*Feldman v. McGuire*, 309.

EVIDENCE.

JUDICIAL NOTICE.

1. The courts cannot take judicial knowledge that values have been unreasonably increased or diminished under a system adopted for ultimate equalization.—*Dayton v. Multnomah County*, 239.

BURDEN OF PROOF—REASONABLENESS OF CUSTOM.

2. Usages are presumed to be reasonable, and the person attacking them has the burden of showing their unreasonableness.—*Kershaw v. Ladd*, 376.

ORAL INSURANCE—BURDEN OF PROOF.

3. The burden is with the person claiming under a policy to show its terms, and in case of an oral insurance the claimant must prove the conditions of the contract usually issued by that company to cover the given kind of property.—*Cleveland Oil Co. v. Norwich Insurance Society*, 228.

FRAUDULENT CONVEYANCE—BURDEN OF PROOF AS TO GOOD FAITH.

4. The burden is upon the defendants, in an action by creditors to set aside a conveyance from an insolvent debtor to his children, to point out definitely the various items going to make up the indebtedness constituting the alleged consideration for the conveyance, where the conveyance and the circumstances under which it was made bear the semblance of an attempt to cover up the property of the debtor.—*Bank of Colfax v. Richardson*, 520.

CHATTEL MORTGAGE AS EVIDENCE OF OWNERSHIP.

5. A chattel mortgage after default is admissible in evidence to support an averment of ownership and right of possession in the mortgagee in an action in replevin by the latter, since a chattel mortgagee then has a qualified ownership, and may prove it under an allegation of absolute ownership.—*Reinstein v. Roberts*, 87.

REPLEVIN—EVIDENCE TO DISPROVE OWNERSHIP.

6. The minutes of the board of directors of a railroad company showing a contract with its manager in his individual capacity for the construction of its road are admissible to impeach the company's title to chattels in an action to recover them from an officer who seized them under execution against the manager, over the objection that the contract was not within sufficient proximity in point of time to the date of the purchase to create the presumption that the contractor was still working thereunder at the time of the purchase, where the minutes of subsequent meetings are introduced showing that up to and subsequent to the commencement of the action both parties treated the contract as subsisting.—*Cos Bay Railroad Company v. Slight*, 80.

EVIDENCE OF AGENCY.

7. In an action to recover for goods sold, on an issue as to whether defendant purchased for himself, or as the agent of his wife, evidence that the business for which the goods were purchased was owned by him but conducted in the name of his wife was competent, though tending to show that he carried it on in her name for the purpose of defrauding his creditors.—*Bolefuhr v. Rometsch*, 491.

8. In an action by a solicitor against an insurance company to recover on a contract made with him by certain agents of defendant, it is competent to show that these agents delivered blank policies to plaintiff, received his returns from business written on these policies, and paid him part of the commission, as tending to explain and establish both the extent and character of the authority of sub-agents.—*Foste v. Standard Insurance Company*, 125.

9. A letter from an insurance company to a person soliciting business for it, directing him, on account of the death of a person designated as "our late manager," to report his business to the company's cashier, is admissible upon the question as to what the authority was of the person so designated.—*Foste v. Standard Insurance Company*, 125.

UNCONNECTED WITH MAIN SUBJECT.

10. In a proceeding to revoke a physician's license for unprofessional conduct, testimony tending to show that one of defendant's patients had suffered an abortion was properly refused when counsel stated that he doubted if defendant could be connected with the offence.—*State ex rel. v. Estes*, 197.

EVIDENCE OF CUSTOM—ORAL INSURANCE CONTRACT.

11. In support of an oral contract of insurance it is competent to prove a custom of insurance companies with reference to the time the risk attaches in such cases.—*Cleveland Oil Company v. Norwich Insurance Society*, 228.

ADMISSIONS IN OFFER OF COMPROMISE.

12. Admissions of a party, not made when a compromise was under consideration, are admissible against him.—*Cochran v. Baker*, 555.

DECLARATIONS AGAINST INTEREST.

13. Answers filed by defendant making admissions against his interest are admissible against him in a subsequent suit between the same parties.—*Feldman v. McGuire*, 809.

DOCUMENTARY EVIDENCE.

14. Deeds, mortgages, and judgments making a transfer of all the property of a debtor are admissible in an action by a creditor against the transferee, who is alleged to have undertaken to pay the grantor's debts.—*Feldman v. McGuire*, 809.

STATUTE OF FRAUDS.

15. An Agreement to pay the debts of another, in consideration of a conveyance of lands, does not come within the statute of frauds where the contract as to the property is completely executed.—*Feldman v. McGuire*, 809.

DESCRIPTION IN CHATTEL MORTGAGE—PAROL EVIDENCE.

16. A chattel mortgage on a crop of hops described as growing upon three parcels of land situated upon a part of a donation land claim which is referred to by the name of the claimant, the number of the notification and claim, and its township and range, is sufficiently definite in description, as between the parties thereto, to let in parol testimony to identify the property and prove the ownership, in view of the fact that under the Oregon donation laws a person can obtain but one gift of land from the government, and a partial description by metes and bounds may be regarded as surplusage.—*Reinstein v. Roberts*, 88.

PAROL EVIDENCE—CHATTEL MORTGAGE.

17. As between the mortgagor and mortgagee of personal property, and also as between the mortgagee and a third person who has succeeded to the mortgagor's interest with actual notice of the mortgage, parol evidence is admissible to identify the property intended to be covered thereby.—*Reinstein v. Roberts*, 88.

SUFFICIENCY OF EVIDENCE TO SHOW DURATION OF RISK.

18. A stipulation entered into on the trial of an action for damages for the breach of an oral contract to insure, which recites that it was admitted that a specified premium was tendered after the loss, and that it was the usual charge by insurance companies for a \$1,000 policy, such as described in the complaint, but where no policy was described in the complaint, is insufficient to show the duration of the risk, so as to warrant a recovery.—*Cleveland Oil Company v. Norwich Insurance Society*, 228.

AGREEMENT TO MODIFY CONTRACT.

19. An agreement to modify a prior agreement must be established by clear and satisfactory evidence.—*Boyes v. Ramsden*, 253.

EVIDENCE OF NEGLIGENCE.

20. Evidence that a certain water main had burst three times, including the occasion complained of, each time under an ordinary pressure, coupled with testimony that water pipe of that size and thickness will not ordinarily break under such circumstances, if properly constructed and laid, is sufficient to carry the case to the jury on the question of negligence in the construction of the pipe.—*Esberg Cigar Company v. City of Portland*, 282.

INFERENCE OF NEGLIGENCE.

21. The mere happening of an accident causing injury justifies an inference of negligence when the cause of the injury is under the control of the defendant, and the accident is such as in the ordinary course of things does not happen if proper care is used in the management.—*Esberg Cigar Co. v. City of Portland*, 283.

PRESUMPTION AS TO INTEREST DEEDED.

22. The grantor in a deed of part of the land owned by him will be presumed to have intended to convey and the grantee to have intended to take the premises as they openly and visibly appeared at the time the sale was consummated, where the intention of the parties is not discoverable from an inspection of the deed, and proof of actual knowledge of the contracting party with reference to the physical condition of the premises cannot be obtained; but where the actual intent of the parties is shown it will control.—*North Powder Milling Company v. Coughanour*, 9.

REASONABLENESS OF CUSTOM.

23. Usages are presumed to be reasonable, and the person attacking them has the burden of showing their unreasonableness.—*Kershaw v. Ludd*, 376.

ORAL INSURANCE—PRESUMED RATE.

24. An agreement to issue a policy of insurance, without specifying the premium, is a contract at the usual rate in such cases.—*Cleveland Oil Co. v. Norwich Insurance Society*, 228.

ORAL INSURANCE—PRESUMED POLICY.

25. It will be presumed in support of an oral contract of insurance which was actually made that the minds of the parties met upon an agreement containing the terms and conditions of a policy such as is usually issued by the contracting company covering like risks.—*Cleveland Oil Co. v. Norwich Insurance Society*, 228.

For Presumptions in Supreme Court. See APPEAL, 17-20.

EXCESSIVE DAMAGES.

Claim of Excessive Damages is not Ground of Appeal. See APPEAL, 38.

EXECUTIVE Prerogative.

Right to Fill Vacant Office is not a Prerogative. See CONST. LAW, 1.

EXECUTION.

RIGHTS OF EXECUTION CREDITORS UNDER SECTIONS 150 AND 283.

Hill's Ann. Laws §§ 150, 283, providing that, from the time of levying an execution, the judgment creditor shall be deemed a *bona fide* purchaser for value of the property levied upon, does not give a levying judgment creditor priority as against the owner of property purchased by the judgment debtor subsequent to the docketing of the judgment, as agent for the owner, the title to which he took in his own name without his principal's consent, and thereafter, before the levy, conveyed to the principal.—*Dinnick v. Rosenfeld*, 101.

EXECUTORS AND ADMINISTRATORS.

EFFECT OF PROBATING WILL ON ADMINISTRATOR'S POWERS.

1. Where a will is admitted to probate, and letters testamentary issued thereunder, the powers of an administrator who may have been appointed cease immediately.—*Malone v. Cornelius*, 192.

ADMINISTRATION EXPENSES—PRIORITY OF MORTGAGE LIEN

2. Hill's Ann. Laws, § 1184, authorizing an executor to retain expenses of administration in preference to any claim or charge against testator's estate, does not give him a lien for such expenses prior to a mortgage on testator's land, though the other property is not sufficient to pay such expenses.—*Shepard v. Soltzman*, 40.

EFFECT OF PRESENTING CLAIM TO ADMINISTRATOR.

3. A creditor who has acquired an attachment lien before the death of the defendant does not lose his right to enforce such lien by presenting the claim on which the action was based to the administrator of the deceased and having it allowed.—*White v. Ladd*, 422.

EXECUTORS—RIGHT OF ACTION.

4. Executors may sue either individually or in their representative capacity, at their option, on causes of action, whether in contract or in tort, accruing after the death of the intestate or testator; hence, in such cases, the complaint need not show of whose estate they are executors.—*Burrell v. Kern*, 501.

FALSE REPRESENTATIONS.

Effect of on Sale—Duty of Injured Party. See VENDOR AND PUR., 2, 3.

FELLOW SERVANTS.

Character of Act Causing Injury is Test of Liability. See MASTER AND SERV. 1.

Examples of Who are Fellow Servants. See MASTER AND SERVANT, 2, 3.

FENCES.

TRESPASS—ANIMALS RUNNING AT LARGE—FENCES.

Where the fence law is applicable the common law liability for injury by domestic stock to uninclosed land is abrogated.—*Walker v. Bloomingcamp*, 391.

FIRE INSURANCE.

Requisites of an Oral Contract—Presumed Policy and Rate—Custom as to When Oral Contract Becomes Effective. See INSURANCE.

FOLLOWING TRUST PROPERTY. See **TRUSTS AND TRUSTEES**.

FORECLOSURE

Of Bond—When Effective on Tenant's Rights. See **LAND AND TENANT**, 2.
Of Mortgage—Claims Preferred to Mortgage. See **MORTGAGES**, 1.

FRAUD.

VENDOR AND PURCHASER—CONSTRUCTIVE FRAUD—RESCISSION.

Representations made by the vendors of real estate respecting the condition of the title, which, though innocently made, were false in fact, and were relied on by the purchaser, constitute such a constructive fraud as will authorize a court of equity to treat the deed as an executory contract to convey, and to decree the rescission thereof.—*Vaughn v. Smith*, 54.

FRAUDS, STATUTE OF. Same as **STATUTE OF FRAUDS**.

FRAUDULENT CONVEYANCES.

FRAUDULENT CONVEYANCE—ATTACHMENT.

1. Real property fraudulently conveyed by a debtor is as much subject to attachment as though the conveyance had never been made.—*Bank of Colfax v. Richardson*, 520.

FRAUDULENT CONVEYANCE—BURDEN OF PROOF AS TO GOOD FAITH.

2. The burden is upon the defendants, in an action by creditors to set aside a conveyance from an insolvent debtor to his children, to point out definitely the various items going to make up the indebtedness constituting the alleged consideration for the conveyance, where the conveyance and the circumstances under which it was made bear the semblance of an attempt to cover up the property of the debtor.—*Bank of Colfax v. Richardson*, 520.

GARNISHMENT.

Acts Not Constituting Actual Possession. See **ATTACHMENT**, 4.

GOVERNMENT LANDS. Same as **PUBLIC LANDS**.

HARMLESS ERROR. See **APPEAL**, 29, 30.

HIGHWAYS.

CHANGING ROADS INTO STREETS—ADDITIONAL SERVITUDE.

1. The conversion of a county road into a city street does not impose an additional servitude on the land occupied by the road, requiring additional compensation to be made to the owner of the fee, under the State Constitution, Article I, § 18, prohibiting the taking of private property for public use except on payment of a just compensation to the owner.—*Huddleston v. City of Eugene*, 343.

PIPES AND SEWERS NOT A NEW SERVITUDE ON COUNTY ROAD.

2. The use of a street for laying pipes, and constructing drains, sewers, and culverts, does not impose an additional servitude on the land, so as to prevent the conversion of a public road into a city street without additional compensation to the owner of the fee.—*Huddleston v. City of Eugene*, 341.

STREET IMPROVEMENT NOT A NEW SERVITUDE.

3. The fact that adjacent property is liable to assessment for maintaining and improving the street does not constitute an additional servitude for which additional compensation must be made as a condition of changing a country road into a city street.—*Huddleston v. City of Eugene*, 344.

HIRING AT WILL. See **CONTRACTS**, 12.

HOUSE OF ILL FAME

Is Public Nuisance—Power to Prevent Construction of. See **EQUITY**, 6, 7.

IMPAIRING OBLIGATION OF CONTRACTS.

Implied Contracts are Protected by the Prohibition. See **CONST. LAW**, 9.

INDEMNITY.

JOINT AND SEVERAL JUDGMENT—JOINT BOND.

1. In an action on a bond of indemnity given by several parties, a recovery must be had against all or none, unless one or more has set up and maintained a defense personal to himself.—*Thomas v. Barnes*, 416.

INDEMNITY TO OFFICER—DEFENSE.

2. Where several attaching creditors give a bond to the sheriff conditioned that, if he will hold certain attached property against all claimants, defendants will indemnify him against any loss or damages by reason thereof, a direction to release one or more attachments would constitute no defense, the liability not being severable.—*Thomas v. Barnes*, 416.

INFERENCE

Of Negligence From Happening of Accident. See EVIDENCE, 21.

INJUNCTION.

TENDER OF TAX.

1. A suit to enjoin the collection of part of a tax cannot be entertained until there has been a payment or tender of the amount admitted by plaintiff to be due.—*Dayton v. Multnomah County*, 239.

AGAINST ERECTION AND MAINTENANCE OF BAWDY HOUSES.

2. Equity has jurisdiction to restrain existing or threatened public nuisances by injunction, at the suit of a private person who suffers inherefrom a special and peculiar injury distinct from that suffered by him in common with the public at large.—*Blagen v. Smith*, 394.

3. The rule that an injunction will not be granted against the continuance of a nuisance in a locality mainly occupied for business, does not apply where the nuisance is *malum in se*, such as a house of ill fame.—*Blagen v. Smith*, 394.

4. Owners of property so near to a house of ill fame that their enjoyment of their property is affected by scenes and sounds in such house sustain an injury different in kind from that suffered by the public at large, which entitles them to an injunction against the maintenance of the nuisance.—*Blagen v. Smith*, 394.

INSOLVENTS AND INSOLVENCY.

PREFERRED CLAIM—OPERATING EXPENSE.

1. A claim for the purchase price of apparatus and appliances furnished to a street railway company, which enhanced the value of its property, but were not necessary to keep the enterprise a going concern, is not entitled, after the appointment of a receiver for the company, to a preference over a prior mortgage. The test of preferability is the actual necessity for the article furnished; if the mortgaged property could not be safely used without it, there is a preference for its price, otherwise not.—*McCornack v. Salem Railway Company*, 543.

2. The fact that a heater furnished to an electric company before its insolvency has already earned a sum equal to the agreed consideration, by effecting a saving in fuel, does not give the seller a preferred claim for payment out of the receipts of the company.—*McCornack v. Salem Railway Company*, 543.

BACK CLAIMS.

3. A receiver appointed in a suit to foreclose a mortgage on the property of a corporation who is directed to take into his possession and control all its property, and to pay all current expenses incident to the administration of his trust, and to the condition and operation of the business of the corporation from time to time as it arises and accrues, is not thereby required to pay a claim which accrued prior to his appointment, and which is not entitled to preference over the mortgage creditors.—*McCornack v. Salem Railway Company*, 543.

FOLLOWING TRUST FUNDS—PREFERENCES.

4. One claiming a preference over other creditors on account of trust property must identify the specific property, or its proceeds, or show that the property of the debtor which he seeks to affect with the preference includes the trust property.—*Shute v. Hinman*, 578.

5. Where a trustee deposited trust funds to his credit in his own bank, and such funds were commingled with and used as a part of the general funds of the bank, in the ordinary course of its business, so that the identity of the trust fund was wholly lost, the trust creditor is not entitled to a preference over other creditors out of money left in the bank upon an assignment by the trustee for creditors.—*Shute v. Hinman*, 578.

INSTRUCTIONS TO JURIES.

Directing Attention to Special Points not Improper. See TRIAL, 8.

When Evidence is Conflicting Question is for the Jury. See TRIAL, 7.

Instructing Jury by Justice not Ground for Review. See WRIT OF REV., 4.

INSURANCE.

REQUIREMENTS OF AN ORAL CONTRACT OF INSURANCE.

1. To render binding a contract of insurance, or to insure, there must be a subject-matter to which the policy is to attach, and a risk to be insured against; the amount of the indemnity and the duration of the risk must be definitely fixed, and the premium or consideration must be agreed upon or paid, or exist as a valid legal charge against the insured.—*Cleveland Oil Company v. Norwich Insurance Society*, 228.

EVIDENCE OF CUSTOM—ORAL INSURANCE CONTRACT.

2. In support of an oral contract of insurance it is competent to prove a custom of insurance companies with reference to the time the risk attaches in such cases.—*Cleveland Oil Company v. Norwich Insurance Society*, 228.

ORAL INSURANCE—PRESUMED RATE.

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4. It will be presumed in support of an oral contract of insurance which was actually made that the minds of the parties met upon an agreement containing the terms and conditions of a policy such as is usually issued by the company covering like risks.—*Cleveland Oil Company v. Norwich Insurance Society*, 228.

ORAL CONTRACT—BURDEN OF PROOF AS TO CONDITIONS.

5. It is essential to a recovery under an alleged oral contract of insurance that the terms of the policy that would have been issued shall be proven, and the burden of so doing rests with the plaintiff.—*Cleveland Oil Company v. Norwich Insurance Society*, 228.

DURATION OF RISK—SUFFICIENCY OF EVIDENCE.

6. A stipulation entered into on the trial of an action for damages for the breach of an oral contract to insure, which recites that it was admitted that a specified premium was tendered after the loss, and that it was the usual charge by insurance companies for a \$1,000 policy, such as described in the complaint, but where no policy was described in the complaint, is insufficient to show the duration of the risk so as to warrant a recovery.—*Cleveland Oil Company v. Norwich Insurance Society*, 228.

INTEREST.

INTEREST ON CONTRACTS.

1. Contracts stipulating for interest will draw interest at the agreed rate, or the statutory rate prevailing at the date of the instrument, until final payment, without regard to any intermediate change in the law.—*Seton v. Hoyt*, 266; *Shipley v. Hacheney*, 303.

INTEREST ON COUNTY ORDERS—IMPLIED CONTRACT.

2. Under Hill's Ann. Laws, § 2465, providing that the county treasurer shall pay all orders of the county clerk when presented, if there is money in the treasury for that purpose, but if not, he shall indorse thereon, "Not paid for want of funds," which shall entitle such order thenceforth to draw legal interest, two implied contracts are engendered, viz.: that the holder of the order will wait for payment until sufficient money has been accumulated in the usual course of public business to pay the claim, and that the county will pay the legal rate of interest upon the order.—*Seton v. Hoyt*, 266.

RATE OF INTEREST ON CITY AND COUNTY ORDERS.

3. The rate of interest on county and city warrants indorsed "Not paid for want of funds" is the rate prevailing at the date of such indorsement, and cannot afterward be reduced.—*Seton v. Hoyt*, 266; *Shipley v. Hacheney*, 303.

4. Act of October 14, 1898, changing the rate of interest, is not extended to outstanding warrants by the provision that, "Inasmuch as the counties * * * are paying interest on their county warrants at the rate of eight per cent. per annum, thereby imposing a useless burden upon the taxpayers, this act shall become a law upon receiving the signature of the Governor."—*Seton v. Hoyt*, 266.

LIABILITY OF MUNICIPAL CORPORATIONS FOR INTEREST.

5. The liability of a city for interest on its debts is ordinarily the same as that of an individual.—*Shipley v. Hachaney*, 303.

CONTRACT TO PAY INTEREST—SUBSEQUENT LEGISLATION.

6. The presentation of a warrant, and its indorsement by the city treasurer as prescribed by an ordinance, constitute a contract between the city and the warrant holder entitling the latter to the stated rate of interest until the warrant is paid, or notice given to him of sufficient funds to pay it, which is not affected by subsequent legislation changing the rate of interest on similar demands.—*Shipley v. Hachaney*, 303.

IRRIGATION. Same as WATERS AND WATER RIGHTS.

JUDICIAL NOTICE

Of Unusual Change of Values by Board of Equalization. See EVID., 1.

JUDGMENTS.

WHEN DENIED COUNTERCLAIM IS STRICKEN OUT.

1. Where defendant sets up new matter as a counterclaim which is denied in reply, and afterward such counterclaim is stricken out, whereupon plaintiff takes a nonsuit, the defendant cannot possibly be entitled to judgment on the counterclaim, even if it was improperly stricken out, for it has been put in issue.—*Bailey v. Wilson*, 186.

ASSUMING MORTGAGE—DEFAULT PERSONAL JUDGMENT.

2. A complaint alleging that defendant purchased certain mortgaged property and assumed the payment of the mortgage is enough to sustain a personal judgment by default for the amount of such encumbrance.—*Petteys v. Comer*, 33.

LIEN OF ON BARE LEGAL TITLE AFTERWARD ACQUIRED.

3. Lands purchased through an agent who took the title in his own name, without the principal's knowledge or consent, and then conveyed to her, are not thereafter subject to execution on a prior judgment against the agent, since he had only the bare legal title without any interest in the property itself.—*Dimmick v. Rosenfeld*, 101.

REPLEVIN—FORM OF JUDGMENT.

4. An alternative judgment for the sheriff in an action against him to recover property seized under execution, which was taken from him at the commencement of the proceeding, should be for the full value of the property, though it exceeds the amount due on the execution, where a third person is found to be the general owner.—*Cobs Bay Railroad Company v. Siglin*, 80.

JUSTICE OF THE PEACE—JUDGMENT BY DEFAULT.

5. Under the statute, Laws, 1883, p. 38, a defendant has the choice of an oral or written answer, but some answer must be made or judgment may be entered against him.—*Whipple v. Southern Pacific Company*, 370.

APPEAL FROM DEFAULT JUDGMENT.

6. Laws, 1883, p. 38, § 6, does not modify Section 2117, Hill's Ann. Laws, prohibiting an appeal from a judgment in a justice's court given for want of an answer, so that such a judgment is still not appealable.—*Whipple v. Southern Pacific Company*, 370.

JUSTICE OF THE PEACE—APPEAL—TORT.

7. To entitle a defendant who suffered a default in a justice's court in an action for tort to appeal from the assessment of damages against him under Hill's Ann. Laws, § 240, subd. 2, permitting the defendant, notwithstanding his default, to offer proof on the question of damages and to appeal from the assessment thereof, he must have offered proof in the justice's court.—*Whipple v. Southern Pacific Company*, 370.

JUDGMENT ON DISMISSING APPEAL.

8. The circuit court, in dismissing an appeal from a justice's court, cannot render judgment for appellee.—*Whipple v. Southern Pacific Company*, 371.

JOINT AND SEVERAL JUDGMENT—JOINT BOND.

9. In an action on a bond of indemnity given by several parties, a recovery must be had against all or none, unless one or more has set up and maintained a defense personal to himself.—*Thomas v. Barnes*, 416.

SETTING ASIDE JUDGMENT.

10. The discretion of the trial court in setting aside a default judgment upon an application made two days after such default, will not be disturbed on appeal where it appears from the affidavits of defendant's attorney in support of the motion that the practice prevailed that, unless the time for answering expired before the beginning of the term, the cause would go over, and that the default was entered and the jury called to assess the damages pending negotiations in reference to the subject-matter of the litigation.—*Coos Bay Navigation Company v. Endicott*, 574.

COLLATERAL ATTACK ON JUDGMENT.

11. The record of the proceedings of a superior court cannot be collaterally attacked for errors or irregularities appearing on its face, unless it affirmatively shows an absence of jurisdiction.—*Bank of Colfax v. Richardson*, 518.

ACQUIRING JURISDICTION IN ACTIONS AGAINST NONRESIDENTS.

12. Under a system where the attachment is merely auxiliary to the main action, and the proceedings are the same against both resident and nonresident debtors, the authority to proceed to judgment depends upon the personal or constructive service of the court's process, and upon the actual seizure of the property to be affected by the judgment, and not upon the regularity of the attachment proceedings, or of any step after the service of the process.—*Bank of Colfax v. Richardson*, 519.

COLLATERAL ATTACK ON JUDGMENT.

13. The judgment of a superior court against a nonresident acquired by a publication of summons cannot be attacked collaterally for any defect in the attachment proceedings, if such proceedings are not made by statute jurisdictional, unless the record affirmatively shows a want of jurisdiction; that is, if the seizure was complete and the court had authority to pass on the cause of action, the judgment is conclusive on the world, regardless of all irregularities or defects in the attachment proceedings.—*Bank of Colfax v. Richardson*, 519.

JUDGMENT ROLL—SUMMONS.

14. A judgment is not void and subject to collateral attack because the original summons does not appear in the judgment roll, where the proof of publication of summons as well as the findings and recitals in the judgment show that a summons was in fact issued.—*Bank of Colfax v. Richardson*, 520.

COLLATERAL ATTACK—ISSUING SUMMONS BEFORE WRIT.

15. A judgment *in rem* against attached property in Oregon is not subject to collateral attack because the record does not affirmatively show that a summons was issued in the action at or before the issuance of the writ of attachment.—*Bank of Colfax v. Richardson*, 519.

REQUIRING BONDS FOR COSTS NOT REVEIWAble.

16. Error of a justice of the peace in requiring a party to give two separate undertakings for costs and disbursements is not ground for vacating the judgment on the merits.—*Long v. Thompson*, 359.

CHARGING JURY BY JUSTICE.

17. The fact that a justice of the peace charged the jury is not ground for disturbing the judgment on writ of review.—*Long v. Thompson*, 359.

FAILURE TO SETTLE COST BILL NOT FATAL.

18. Failure of a justice to pass on objections to the cost bill is not ground for vacating the judgment.—*Long v. Thompson*, 359.

JURISDICTION

Of Equity Cannot be Conferred by Consent of Parties. See EQUITY, 1.

Of Equity to Give Judgment When Mortgage Fails. See EQUITY, 8.

For one Purpose is for All Purposes—When Not Applicable. See EQUITY, 3.

Of Equity to Enjoin Public Nuisances—Erection of Brothels—Special Injury to Complainant. See EQUITY, 4, 5, 6, 7.

Actual Seizure of Defendant's Property is Necessary to Confer Jurisdiction Over Nonresidents. See ATTACHMENT, 9.

JUSTICES OF THE PEACE.

WRIT OF REVIEW—INSTRUCTING JURY IN JUSTICE'S COURT.

1. The assumption by a justice of the peace of the right to instruct the jury in a case on trial before him, even if unauthorized, does not affect his jurisdiction, nor afford ground for disturbing his judgment on a writ of review.—*Long v. Thompson*, 350.

NEGLECT TO SETTLE OBJECTIONS TO COST BILL.

2. The neglect of a justice of the peace to pass upon objections made by a party to a cost bill affords no ground for vacating and setting aside the justice's judgment upon a writ of review.—*Long v. Thompson*, 350.

TRYING CASE ON DEFECTIVE ANSWER.

3. Where trial was had in a justice's court, without objection, on an answer purporting to deny the material allegations of the complaint, it cannot be afterwards urged on writ of review that the answer was insufficient.—*Long v. Thompson*, 350.

REQUIRING UNNECESSARY BOND FOR COSTS.

4. An error of a justice of the peace in requiring plaintiff to give an additional undertaking for costs and disbursements, after he had already made a deposit for that purpose, is not a sufficient ground for vacating by writ of review the justice's judgment after a trial on the merits.—*Long v. Thompson*, 350.

NECESSITY OF ANSWER TO PREVENT DEFAULT.

5. The mere presence of the defendant in court by an attorney will not prevent the rendition of a judgment against him in a justice's court for want of an answer under Hill's Ann. Laws, § 530. Under the statute, Laws, 1888, p. 38, he has the choice of an oral or written answer, but some answer must be made or judgment may be entered against him.—*Whipple v. Southern Pacific Company*, 370.

JURISDICTION OF JUSTICES OF THE PEACE IN REAL PROPERTY ACTIONS.

6. Under Hill's Ann. Laws, § 900, subd. 1, providing that the jurisdiction of a justice's court shall not extend to an action in which the title to real property is in question, and section 2001, which provides that if it appear, "from the evidence of either party, that the title to lands is in question, which title shall be disputed by the other party," the case shall be certified to the circuit court, the justice does not lose jurisdiction of an action over which he otherwise has jurisdiction because the pleadings make an issue of title to realty. That result is accomplished only when it appears on the trial from the evidence that the title to land is actually contested.—*Malarkey v. O'Leary*, 403.

FILING ANSWER AFTER APPEAL FROM DEFAULT JUDGMENT.

7. From a judgment entered in a justice's court for want of an answer no appeal can be taken, and, necessarily, no amendment by way of answer can be made in the circuit court.—*Whipple v. Southern Pacific Company*, 370.

LACHES

As Affecting Right to Rescind Purchase or Contract. See CONTRACTS, 3.

As a Bar in Equity to Recovery of Lands. See EQUITY, 10, 11.

LANDLORD AND TENANT.

EFFECT OF FORECLOSURE ON TENANT'S RIGHTS.

1. The rights of a tenant are not affected by a foreclosure until the delivery of the sheriff's deed after confirmation of the sale.—*Stevens v. Brown*, 454.

TERMINATION OF TENANCY UNDER BOND FOR DEED.

2. The tenancy at will initiated between a vendor and vendee of real property by the failure of the latter to carry out the contract of sale is terminated by a tender of compliance therewith by the vendor, coupled with the ability to make good the tender.—*Stevens v. Brown*, 454.

FORECLOSURE SUIT AS NOTICE TO QUIT.

3. The commencement of a suit to foreclose a bond for a deed, is equivalent to a notice to the vendee in possession to quit, within the terms of Section 3523, Hill's Ann. Laws, giving a tenant the right to harvest a crop sown before receiving a notice to quit.—*Stevens v. Brown*, 454.

VENDOR AND PURCHASER—EFFECT OF REFUSAL TO PAY.

4. A vendee in possession of real property under a contract for its purchase is liable to the vendor for the reasonable rent thereof from the date of his refusal to carry out the contract.—*Stevens v. Brown*, 454.

RIGHT TO EMBLEMENTS.

5. The landlord is entitled to crops sown after the tenant has been notified to quit.—*Stevens v. Brown*, 454.

LATIN MAXIMS.

Expressio Unius est Exclusio Alterius.—*Blagen v. Smith*, 402.

Res Ipsa Loquitur.—*Esberg Cigar Co. v. City of Portland*.

Respondeat Superior.—*Esberg Cigar Co. v. City of Portland*, 293-301.

LEGISLATIVE POWER

To Ratify or Validate Contracts Originally Void. See CONST. LAW, 8.

To Create Offices and to Fill Vacancies in Office. See CONST. LAW, 1, 2, 7.

LEVY AND SEIZURE.

Some Conditions Rendering Actual Seizure Proper. See ATTACHMENT, 4.

Leaving Copy on Land When no Occupant is Found. See ATTACH., 6, 7, 10, 12.

Actual Seizure—Jurisdiction Over Nonresident. See ATTACHMENT, 8, 9.

LIEN.

Expenses and Charges of Administration—Priority Over Mortgage Made by Deceased. See EXECUTOR AND ADMINISTRATOR, 2.

Of Judgment on After Acquired Property. See JUDGMENT, 3.

Attachment Lien—Effect of Presenting to Administrator. See ATTACH., 5.

LIMITATION OF ACTIONS. Same as STATUTE OF LIMITATIONS.

MASTER AND SERVANT.

WHO ARE FELLOW SERVANTS.

1. Whether injuries to a servant were caused by negligence of a fellow-servant depends upon the nature of the action in the performance of which the employee was negligent, and not upon the employee's grade or rank. If the act was one the master owed to the servant, the master is liable; but, if the act pertained merely to the duty of an operative, the employee, notwithstanding he may have had supervisory power, was a fellow-servant with his injured co-laborer.—*Must v. Kern*, 247, *Brunell v. Southern Pacific Company*, 257.

SUPERINTENDENT AND WORKMAN—INJURY TO EMPLOYEE.

2. The negligence of the superintendent and manager of a quarry, who has power to hire and discharge employees, in directing workmen with whom he is engaged in blasting to put powder into a hole, without waiting a sufficient time for the hole to cool after giant powder had been exploded therein, is that of a fellow-servant, and not of a vice-principal.—*Must v. Kern*, 247.

DUTY OF RAILROAD TO EMPLOYEE.

3. A railroad company is not bound to keep a signal to warn workmen on a hand car of the situation of section men at work on the track.—*Brunell v. Southern Pacific Company*, 257.

SECTION HAND AND MAN GOING ON HAND CAR TO WORK.

4. Plaintiff was an experienced section hand, surfacing defendant's track about three-fourths of a mile from a station. He knew that bridge carpenters would run a hand car toward him from the station while he was at work. It was possible to see their approach the whole distance. No signal warned the men on the car of the men at work on the track, and while plaintiff's back was turned the car approached at the expected time; but he did not hear it, on account of the noise from their work. He and his fellow workmen sprang aside, and one carelessly dropped his tamping bar. The car struck it and threw it against plaintiff, breaking his leg. *Held*, that his injury was due to the negligence of his fellow-servants, and to his own carelessness.—*Brunell v. Southern Pacific Company*, 258.

MECHANIC'S LIENS.

MECHANIC'S LIEN A PRIVILEGE.

1. The right to assert and perfect a mechanic's lien is a statutory privilege and may be exercised or waived as the lienor may prefer.—*Hughes v. Lansing*, 118.

WAIVER OF LIEN.

2. The right to a mechanic's lien under the Oregon statutes may be waived by express agreement, as well as by neglecting to perfect the lien within the statutory time.—*Hughes v. Lansing*, 118.

RELEASE OF LIEN—CONSIDERATION.

3. A payment by the owner of a building to his contractor in reliance upon a waiver by a materialman of his right to a mechanic's lien, and a like payment by the contractor to the materialman, pursuant to an understanding to that effect when the waiver was signed, is a sufficient consideration to support the waiver, although it did not by its terms require any payment by the contractor.—*Hughes v. Lansing*, 118.

EFFECT OF A WAIVER OF CLAIM FOR MATERIAL.

4. A waiver of all claims for materials furnished to the contractor, and used in certain buildings, is equivalent to a waiver of the right or privilege of claiming a lien therefor against the property.—*Hughes v. Lansing*, 118.

STATUTE OF FRAUDS—CHARACTER OF LIEN.

5. The right of preserving and enforcing a mechanic's lien is not an interest in land, and an agent's authority to act with reference to it need not be in writing.—*Hughes v. Lansing*, 118.

AUTHORITY OF AGENT.

6. Where an agent has authority to represent the principal in carrying on the business of manufacturing and selling lumber and in filing mechanics' liens, the agent's waiver of a mechanic's lien for lumber sold by him for the principal is binding on the principal.—*Hughes v. Lansing*, 118.

CONFUSED CLAIM.

7. A claim of mechanic's lien is unavailing for any purpose where it is impossible to segregate the lienable items from the nonlienable ones in the account set forth in the claim of lien.—*Hughes v. Lansing*, 118.

NONLIENABLE ITEMS.

8. A mechanic's lien is not void *in toto* because the statement of account on which it is based included nonlienable items, where they were included without improper motives, and are capable of being segregated.—*Cochran v. Baker*, 555.

RELEASE OF SURETY BY PREMATURE PAYMENT.

9. The payment of an installment on a building contract in advance of the time provided by the contract discharges the surety on the contractor's bond against mechanics' liens only to extent of such payment.—*Cochran v. Baker*, 555.

MEDICAL BOARD.

Right of State Board to Appeal to Supreme Court. See **PHYS. AND SURG.**, 2.

Right to Recover Costs Against Medical Board. See **PHYS. AND SURG.**, 1.

Decree Directing Board to Reinstate Accused. See **PHYS. AND SURG.**, 5.

MONEY HAD AND RECEIVED.**PLEADING—RIGHT OF ACTION.**

Where the maker of a note delivered money to a bank to be forwarded to the payee and applied on his note, and the bank delivered it to another bank, with instructions to pay it to the payee generally, the latter bank was not, on failing to pay over the money, liable to an indorsee of the note as for money had and received, there being no obligation on its part to pay it to the indorsee, or to see that it was applied on the note.—*First National Bank v. Hovey*, 162.

MORTGAGES.**ADMINISTRATION EXPENSES—PRIORITY OF MORTGAGE LIEN.**

1. Hill's Ann. Laws, § 1188, authorizing an executor to retain expenses of administration in preference to any claim or charge against testator's estate, does not give him a lien for such expenses prior to a mortgage on testator's land, though the other property is not sufficient to pay such expenses.—*Shepard v. Saltzman*, 40.

VALIDATING VOID MORTGAGE BY SUBSEQUENT LEGISLATION.

2. Where a mortgage is absolutely void, because it covers land in more than one county, its validity cannot be cured by subsequent legislation repealing the provision, or consolidating counties in such a way as to bring the lands mortgaged within one county.—*Denny v. McCown*, 48.

CONSTRUCTION OF MORTGAGE TAX LAW.

3. Hill's Ann. Laws, § 2786, making "void" mortgages and deeds of trust covering lands in more than one county was designed to increase the state revenues, and should, therefore, receive a liberal construction. The word "void," as here used, means entirely invalid for any purpose.—*Denny v. McCown*, 48.

MORTGAGE FORECLOSURE—PERSONAL JUDGMENT.

4. An allegation in a complaint for a mortgage foreclosure that the holder of the property purchased it subsequent to the execution of the mortgage and assumed its payment is sufficient to support a personal decree against him by default.—*Pelleys v. Comer*, 38.

AGREEMENT IN DEED TO PAY MORTGAGE.

5. A grantee of mortgaged property who accepts a deed therefor reciting that he assumes and agrees to pay the mortgage debt is not personally liable therefor unless his immediate grantor was so bound.—*Young Men's Association v. Craft*, 106; *Portland Trust Company v. Nunn*, 166.

PENALTY FOR FAILURE TO DISCHARGE MORTGAGE.

6. It is no defense in an action for a penalty under Hill's Ann. Laws, § 3084, for refusal or neglect to discharge a mortgage, that the mortgagor is indebted to the mortgagee outside of the mortgage debt.—*Malarkey v. O'Leary*, 494.

7. Attorney's fees incurred in the preparation for foreclosure proceedings are not "reasonable charges" within Hill's Ann. Laws, § 3084, prescribing a penalty for the neglect or refusal of a mortgagee upon request to discharge a mortgage after performance of the condition and tender of his "reasonable charges," by that term the statute contemplates only such charges as may reasonably be incurred in the matter of the discharge of the mortgage.—*Malarkey v. O'Leary*, 494.

8. The fact that a mortgagee acted in good faith in refusing to discharge a mortgage after payment, under the honest belief that he need not do so until payment of expenses incurred in preparation for foreclosure proceedings, does not relieve him from liability for the statutory penalty provided by Hill's Ann. Laws, § 3084.—*Malarkey v. O'Leary*, 494.

CLAIMS NOT ENTITLED TO PRECEDENCE OVER MORTGAGE.

9. A claim for the purchase price of apparatus and appliances furnished to a street railway company which enhanced the value of its property, but were not necessary to keep the enterprise a going concern, is not entitled, after the appointment of a receiver for the company, to a preference over a prior mortgage. The test of preferability is the actual necessity for the article furnished; if the mortgaged property could not be safely used without it, there is a preference for its price, otherwise not.—*McCornack v. Salem Ry. Co.*, 543.

EFFECT OF FORECLOSURE ON TENANT'S RIGHTS.

10. The rights of a tenant are not affected by a foreclosure until the delivery of the sheriff's deed after confirmation of the sale.—*Seivers v. Brown*, 454.

MOTION

To Strike Out Parts of Brief Before Hearing. See COURTS, 7.

To Dismiss Appeal—Sufficiency. See APPEAL, 9.

MUNICIPAL CORPORATIONS.

CONTROL OVER PORTLAND BRIDGES—CONSTRUCTION OF STATUTE.

1. The power conferred by the legislature upon the Bridge Committee of the City of Portland (Laws, 1895, p. 421, § 15), authorized the committee to enter into an original contract with a street railway company for the use of the Morrison Street Bridge. The statute was not intended to restrict the committee to negotiations for the cancellation of existing rights.—*Multnomah County v. City Ry Co.*, 93.

MUNICIPAL WATER WORKS—LIABILITY FOR NEGLIGENCE.

2. A system of water works operated for profit by a city belongs to the municipality in its private rather than in its public or governmental character, and the city is liable as a private proprietor would be for the negligent construction or maintenance thereof.—*Esberg Cigar Co. v. City of Portland*, 282.

3. The appointment of the water committee of a city by the legislature, and the fact that it is independent of the control of any other department of the municipal government, will not relieve the city from liability for injuries caused by its negligence in the construction or maintenance of the city water works.—*Esberg Cigar Co. v. City of Portland*, 282.

MUNICIPAL AGENTS—RESPONDEAT SUPERIOR.

4. By adopting a charter providing for the construction of water works, and for a committee to operate the system when complete, the people of a city make such committee the agent of the municipality, for whose negligence it must answer, under the doctrine of *respondet superior*.—*Esbey Cigar Company v. City of Portland*, 282.

RESPONSIBILITY FOR ACTS OF MUNICIPAL AGENTS.

5. The responsibility of a city for the acts of its officers or agents does not depend upon the manner of their appointment, but upon the character of their duties: if these are political or governmental, the city is not liable for their negligence; but if the duties concern what may be called the private affairs of the corporation, it is liable.—*Esbey Cigar Company v. City of Portland*, 282.

POWER TO ENACT ORDINANCE.

6. Under a city charter empowering the council to appropriate money to pay the debts, liabilities, and expenditures of the city, and requiring the treasurer to pay interest on interest-bearing warrants, that body may enact an ordinance requiring the city treasurer, on presentation to him of a warrant for the payment of which he has no appropriate funds, to indorse it, and providing that after such indorsement it shall bear a stated rate of interest, which is not higher than the legal rate.—*Shipley v. Hachenev*, 303.

7. An authority to appropriate money for the payment of the debts of a city, considered in connection with the general power accorded to all chartered municipalities, and the implied powers accompanying the same, unless specially restricted, to enter into contracts necessary to enable them to carry out the powers conferred, is sufficient to justify an ordinance providing for the payment of interest on overdue obligations of the city.—*Shipley v. Hachenev*, 303.

CONTRACT TO PAY INTEREST—SUBSEQUENT LEGISLATION.

8. The presentation of a warrant, and its indorsement by the city treasurer as prescribed by an ordinance, constitute a contract between the city and the warrant holder entitling the latter to the stated rate of interest until the warrant is paid, or notice given to him of sufficient funds to pay it, which is not affected by subsequent legislation changing the rate of interest on similar demands.—*Shipley v. Hachenev*, 303.

RATIFICATION OF CONTRACT.

9. Portland City Charter, § 218, adopted October 22, 1898, authorizing the issuance of bonds to retire outstanding warrants against the city's general fund, which warrants it declares valid and binding obligations against the city, and requires the treasurer to pay out of the proceeds of such bonds, is a recognition and ratification of the city's obligation to pay valid outstanding warrants against the general fund, and interest thereon at eight per cent., as provided for by an ordinance passed under prior charter authority, in spite of the act of October 14, 1898 (Laws, 1898, Sp. Sess. p. 15), reducing the legal rate of interest from eight to six per cent.—*Shipley v. Hachenev*, 303.

EXTENDING STREET OVER COUNTY ROAD—SERVITUDE.

10. A change of a county road to a city street in consequence of the incorporation and extension of a city does not impose an additional servitude upon the real property over which the highway is constructed so as to require any new condemnation.—*Huddleston v. City of Eugene*, 343.

COLLATERAL ATTACK ON ORGANIZATION OF PUBLIC CORPORATION.

11. The legal existence of a public or governmental corporation, organized under color of law, and exercising appropriate powers cannot be questioned except in a direct proceeding by the state for that purpose.—*School District v. School District*, 97.

NEGLIGENCE.

DUTY TO STOP AND LISTEN FOR TRAIN.

1. The failure of a person about to cross a railway track, on a highway at grade, to look and listen for an approaching train, or to stop for such purpose, where the view of the track is obstructed, or where there is noise which he may control, and which may prevent his hearing such train, is negligence *per se*, which will bar a recovery for an injury resulting from a collision with a train at such crossing.—*Blackburn v. Southern Pacific Company*, 215.

ACCIDENT AT CROSSING—CONTRIBUTORY NEGLIGENCE AS A DEFENSE.

2. There can be no recovery for the death of one who was struck by a railway train at a grade crossing, where the evidence showed that, though such train was moving at a rate of speed prohibited by law, the proximate cause of the accident was the negligence of the deceased in approaching such crossing without exercising due caution.—*Blackburn v. Southern Pacific Company*, 215.

NEGLIGENCE BY BANK IN COLLECTION.

3. Where a collecting bank accepted in payment of the collection a check or draft which was dishonored on presentation, it is not liable to the sender of the claim where the latter was not thereby injured.—*Kershaw v. Ladd*, 378.

MUNICIPAL WATER WORKS—LIABILITY FOR NEGLIGENCE.

4. A system of water works operated for profit by a city belongs to the municipality in its private rather than in its public or governmental character, and the city is liable as a private proprietor would be for the negligent or maintenance thereof.—*Esberg Cigar Company v. City of Portland*, 282.

MUNICIPAL AGENT—RESPONDEAT SUPERIOR.

5. By adopting a charter providing for the construction of water works, and for a committee to operate the system when complete, the people of a city make such committee the agent of the municipality, for whose negligence it must answer, under the doctrine of *respondet superior*.—*Esberg Cigar Company v. City of Portland*, 282.

RESPONSIBILITY FOR ACTS OF MUNICIPAL AGENTS.

6. The responsibility of a city for the acts of its officers or agents does not depend upon the manner of their appointment, but upon the character of their duties; if these are political or governmental, the city is not liable for their negligence; but if the duties concern what may be called the private affairs of the corporation, it is liable.—*Esberg Cigar Company v. City of Portland*, 282.

EVIDENCE OF NEGLIGENCE.

7. Evidence that a certain water main had burst three times, including the occasion complained of, each time under an ordinary pressure, coupled with testimony that water pipe of that size and thickness will not ordinarily break under such circumstances, if properly constructed and laid, is sufficient to carry the case to the jury on the question of negligence in the construction of the pipe.—*Esberg Cigar Company v. City of Portland*, 282.

INFERENCE OF NEGLIGENCE.

8. The mere happening of an accident causing injury justifies an inference of negligence when the cause of the injury is under the control of the defendant, and the accident is such as in the ordinary course of things does not happen if proper care is used in the management.—*Esberg Cigar Co. v. City of Portland*, 283.

DUTY OF RAILROAD TO EMPLOYEE.

9. A railroad company is not bound to keep a signal to warn section men at work on the track of the approach of workmen on a hand car.—*Brunell v. Southern Pacific Company*, 257.

NONSUIT.

JUDGMENT WHEN COUNTERCLAIM IS DENIED.

1. Where defendant sets up new matter as a counterclaim which is denied in the reply, and afterward such counterclaim is stricken out, whereupon plaintiff takes a voluntary nonsuit, the defendant cannot possibly be entitled to judgment on the counterclaim, even if it was improperly stricken out, for it has been put in issue.—*Bailey v. Wilson*, 186.

TRIAL—CONFLICTING EVIDENCE.

2. Where there is evidence from which a jury may reasonably infer that the allegations of a complaint are true, a nonsuit should not be granted.—*Feldman v. McGuire*, 300.

NOTICE.

REAL PROPERTY—EFFECT OF NOTICE BY OCCUPATION.

The open, notorious and exclusive possession and occupancy of real property by a stranger to the title puts a purchaser from a third person upon notice and inquiry concerning the rights and equities of the party in possession, and charges him with all the knowledge that he might have obtained upon reasonable inquiry.—*Ambrose v. Huntington*, 485.

NOTICE OF APPEAL.

Proceeding Before Medical Board—Service of Notice. See APPEAL, 11.

Adverse Party Who Must be Served With Notice. See APPEAL, 15.

NOVATION.

CONTRACTS FOR THE BENEFIT OF THIRD PERSONS.

Where one has received from another some fund or property, in consideration of which he has made a promise to or entered into an undertaking with such other for the benefit of a third person, an action thereon may be maintained by such person, though not a party to the transaction.—*Feldman v. McGuire*, 300.

NUISANCE.

JURISDICTION OF EQUITY TO ENJOIN—LAW REMEDY NOT EXCLUSIVE.

1. Equity has jurisdiction to restrain existing or threatened public nuisances by injunction at the suit of a private person who suffers therefrom a special and peculiar injury distinct from that suffered by him in common with the public at large. Hill's Ann. Laws, § 333, providing a remedy at law for a private nuisance by an action for damages and an order to abate the nuisance, is not exclusive, where immediate relief is demanded.—*Blagen v. Smith*, 394.

INJUNCTION—BAWDY HOUSE.

2. A house of ill fame is a public nuisance, wherever it may be situated, and its continuance may be enjoined by any property owner who can show a special injury.—*Blagen v. Smith*, 394.

3. Equity may enjoin the leasing of houses for purposes of prostitution, where in close proximity to the business houses of complainants, who are injuriously affected thereby in the enjoyment of their property.—*Blagen v. Smith*, 394.

OBLIGATION OF CONTRACTS.

Implied as well as Express Contracts are Protected. See CONST. LAW, 9.

OFFICERS.

LOCATION OF APPOINTING POWER.

1. In the absence of a constitutional or legislative restriction the Governor may appoint a person to fill a public office, but that right is not a prerogative of his office.—*State ex rel. v. Compson*, 25.

2. The power to fill a public office may be exercised by either the Governor or the legislature in the absence of a constitutional limitation.—*State ex rel. v. Compson*, 25.

HOLDING OVER—VACANCY IN OFFICE.

3. Mere failure of the legislature for any length of time to appoint successors to officers who are to hold office until their successors are elected and qualified, does not create a vacancy which the Governor is authorized to fill by appointment.—*State ex rel. v. Compson*, 25.

VACANCY—FILING BOND.

4. Failure of officers holding over till their successors are elected and qualified to renew their bonds does not, in the absence of a provision requiring such renewal, make a vacancy to be filled by the Governor.—*State ex rel. v. Compson*, 25.

PUBLIC OFFICIALS—TENURE OF OFFICE.

3. The declaration of the Oregon Constitution, Article XV, § 2, that "the legislature shall not create any office the tenure of which shall be longer than four years," must be read in connection with section 1 of the same article providing that "all officers, except members of the legislature, shall hold their offices until their successors are elected and qualified;" and when interpreted together they mean that the legislature cannot create an office the apparent tenure of which shall exceed four years, but if no successor is then entitled to the office the incumbent holds over, and there is no vacancy.—*State ex rel. v. Compson*, 25.

OPENING DLFAULT is Largely Discretionary. See TRIAL, 2.

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OREGON STATUTES. Same as STATUTES OF OREGON.

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Evidence to Identify Mortgaged Chattels. See EVIDENCE, 16, 17.

Acceptance of Draft is Not Binding. See BILLS AND NOTES, 1.

PARTIES.

DEFECT OF PARTIES—WAIVER OF OBJECTION.

1. The objection that there is a defect of parties either plaintiff or defendant in a proceeding is waived if not made before the trial court, it cannot be first urged on appeal.—*State ex rel. v. Estes*, 197.

APPEAL—FAILURE TO BRING IN UNNECESSARY PARTIES.

2. A case will not be remanded on appeal for the failure of the court below to take special action upon an application to bring in a new party, where, from the respective averments of the parties, it is apparent that he was neither a necessary nor a proper party to the suit.—*Petteys v. Comer*, 36.

DEATH AFTER APPEAL—TIME FOR SUBSTITUTION.

3. Section 38, Hill's Ann. Laws, limiting to a year the time for personal representatives or successors in interest to be substituted for a deceased party does not apply to those cases in which death occurred after an appeal had been perfected.—*Long v. Thompson*, 359.

ABATEMENT AND REVIVAL—TIME FOR APPLICATION.

4. A revival of an action against the personal representatives of a deceased defendant who died before an appeal was taken may be made at any time, if the application therefor is filed within a year from the death.—*White v. Ladd*, 422.

NOTICE TO SUBSTITUTED PARTIES.

5. Where an original defendant was not served with summons, and had not appeared at the time of his death, the personal representative is not entitled to notice of an application for an order of continuance.—*White v. Ladd*, 422.

METHOD OF SUBSTITUTION FOR DECEASED PARTY.

6. The personal representative of a deceased defendant who died before being served with summons is substituted in his stead by the making of an order allowing an amended complaint to be filed in which the representative is named as a defendant, and directing service on her of the order, the amended complaint, and an alias summons.—*White v. Ladd*, 422.

PER CAPITA ET PER STIRPES. See WILLS, 6.

PHRASES. Same as WORDS AND PHRASES.

PHYSICIANS AND SURGEONS.

MEDICAL BOARD—COSTS.

1. Costs are not recoverable by defendant in an action begun before the Board of Medical Examiners to revoke a physician's license, where the case was appealed by the defendant to the circuit court and reversed, since the statute makes no provision therefor.—*State ex rel. v. Estes*, 197.

STATE MEDICAL BOARD—RIGHT TO APPEAL.

2. Under the provisions of the law of 1895 creating the Board of Medical Examiners (Laws, 1895, p. 61), such board may appeal to the supreme court from a judgment of the circuit court reversing its decision on the question of revoking a physician's license.—*State ex rel. v. Estes*, 197.

SERVICE OF NOTICE OF APPEAL ON THE BOARD.

3. A proceeding by the state on the relation of sundry persons to revoke the license of a physician is *quasi* criminal in its nature, and a service of the notice of appeal on the state is sufficient; it need not be served on either the relators or the State Board of Medical Examiners.—*State ex rel. v. Estes*, 197.

MEDICAL BOARD—APPEAL—VENUE.

4. An appeal from the Board of Medical Examiners will not be dismissed where the motion to dismiss recites that the hearing by the board was in the county to the circuit court of which the appeal has been taken as required by law, and the verdict and decision of the board purports to have been made in that county, although the regular meetings of the board are required to be held in another county.—*State ex rel. v. Estes*, 198.

REINSTATEMENT OF PHYSICIAN—POWER OF COURT.

5. That part of a judgment of the circuit court in an action appealed from the Board of Medical Examiners revoking a physician's license which adjudges that the defendant is entitled to practice medicine and surgery, as if the verdict and decision of the board had not been rendered, is erroneous in view of the statutory provision (Laws, 1895, p. 61, § 6), that if the circuit court reverses the action of the board and no appeal is taken to the supreme court within sixty days, the medical board shall immediately reinstate defendant's name upon the records of the board. The proper course is for the circuit court to direct the board to reinstate the accused.—*State ex rel. v. Estes*, 198.

PILOTS AND PILOTAGE.

TOWAGE IS NOT PILOTAGE.

1. A master of a tugboat which is towing a vessel lashed alongside, who directs the movements of the tow by orders to its crew from the tug, is not a pilot, and is not engaged in an act of pilotage under section 1908, Hill's Ann. Laws.—*State v. Turner*, 178.

PILOT DEFINED.

2. A pilot is a person who boards a vessel at a particular place for the purpose of guiding her through a channel, or from or into a port.—*State v. Turner*, 178.

PLEA IN ABATEMENT.

Defect of Parties—How and When Should be Made. See PLEADING, 8.

PLEADING.

COMPLAINT—SHOWING AS TO CAPACITY OF PLAINTIFF.

1. Executors may sue either individually or in their representative capacity, at their option, on causes of action, whether in contract or in tort, accruing after the death of the intestate or testator; hence, in such cases, the complaint need not show of whose estate they are executors.—*Burrell v. Kern*, 501.

FORECLOSURE—SUFFICIENCY OF COMPLAINT.

2. An allegation in a complaint for a mortgage foreclosure that the holder of the property purchased it subsequent to the execution of the mortgage and assumed its payment is sufficient to support a personal decree against him by default.—*Petteys v. Comer*, 36.

INSUFFICIENT TRAVERSE OF AFFIDAVIT FOR ATTACHMENT.

3. An attachment will not be set aside on the ground that the debt sued upon is secured where the traversing affidavit does not allege or admit that fact, but states that plaintiff's assignor claims the right to hold certain property in its possession as collateral security for the indebtedness sued on, and contends that if that is true the attachment should be dissolved.—*Watson v. Loewenberg*, 328.

SUFFICIENCY OF AFFIDAVIT TO DISSOLVE ATTACHMENT.

4. A traverse of the facts alleged in an affidavit for attachment must deny every statutory ground alleged in as direct and explicit terms as if it were an answer to a complaint, and it must be tested by the same rules as though it were a pleading.—*Watson v. Loewenberg*, 328.

SUPPLEMENTAL COMPLAINT—ACCORD AND SATISFACTION.

5. Matters pertinent to the issues, and which may prove controlling in the final disposition of the cause, arising subsequent to the judgment in the justice's court, are not precluded from the consideration of the circuit court upon appeal, but may appropriately be brought onto the record by a supplemental complaint filed in the latter court.—*Robinson v. Carlton*, 319.

SUFFICIENCY OF SUCH SUPPLEMENTAL COMPLAINT.

6. A supplemental complaint filed in the circuit court after defendant had appealed, setting up an accord and satisfaction entered into after the judgment was rendered, is the proper method of bringing that fact onto the record, and is sufficient without setting up the original cause of action, since the two papers are not designed to accomplish the same purpose.—*Robinson v. Carlton*, 319.

AIDER BY VERDICT.

7. In an action for commissions on insurance effected by plaintiff, the omission of the complaint to state whether any insurance was effected or whether any sum was collected is cured by a verdict, where the rate of commissions and the amount due for acting as defendant's agent is alleged.—*Poste v. Standard Insurance Co.*, 125.

PLEA IN ABATEMENT.

8. Where one who is sued for diverting water from a prior appropriator defends on the ground that the water was diverted by others after it passed him, it is in the nature of a plea in abatement, and is demurrable if the defect of parties defendant does not appear on the complaint, and defendant does not name the omitted parties.—*North Powder Milling Co. v. Coughanour*, 10.

REPLEVIN—PROOF UNDER AN ALLEGATION OF OWNERSHIP.

9. In an action of claim and delivery a mortgagee of chattels may prove that the conditions of the mortgage have been broken, whereby he is entitled to possession, though he alleged an absolute ownership.—*Reinstein v Roberts*, 88.

ACTION ON BOND—CONSTRUCTION OF COMPLAINT.

10. A complaint upon an insurance agent's bond alleging that the principal had received various sums which he had failed to pay over, and that upon an accounting and settlement with reference thereto a specified sum was ascertained and determined to be due, which the principal promised and agreed to pay, does not declare upon an account stated, but upon a claim for damages resulting from a breach of the bond.—*Bailey v. Wilson*, 186.

AMENDMENT BY STRIKING OUT.

11. Any amendment of a complaint that will aid the pleader in stating more clearly the cause of action originally intended to be set out should be allowed, if such intention is to be ascertained from the complaint, though care must be taken not to allow the cause of action to be changed, as, for example, an account stated to an open account.—*Bailey v. Wilson*, 186.

DUTY TO PAY OVER MONEY RECEIVED TO USE OF ANOTHER.

12. A complaint in an action by an indorsee of a promissory note against a bank for money had and received, which alleges that the maker delivered to another bank a sum of money to be transmitted to the payee to apply on the note and that the bank telegraphed it to the defendant with instructions to pay it to the payee, is insufficient for failure to show that the latter bank was charged with any duty to pay the money to the indorsee or to say that it was applied on the note, or that it still holds and retains money to his use and benefit.—*First National Bank v. Hovey*, 162.

PORTLAND CHARTER.

Charter 1808. { Section 86, Subd. 38, *Shipley v. Hacheney*, 307.
 { Section 37, *Shipley v. Hacheney*, 307.
 { Section 218, *Shipley v. Hacheney*, 305.
 { Section 219, *Shipley v. Hacheney*, 305.

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As Constructive Notice to Purchaser of the Legal and Equitable Rights of the Occupant. See NOTICE.

POWER OF COURT

To Amend Bill of Exceptions After Appeal is Perfected. See pp. 203-206.

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PREFERRED CLAIM

Against Insolvent Estate for Trust Fund. See INSOLVENTS, 4, 5.

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PRESUMPTIONS. See EVIDENCE, 20-24.

PRINCIPAL AND AGENT. Same as AGENTS AND AGENCY.

PRINCIPAL AND SURETY.

RELATION OF PRINCIPAL AND SURETY.

1. Where one who is not personally responsible as a surety pledges his property to secure the debt or default of another, such property becomes a surety or guaranty for the principal debtor, and any act of the creditor that would discharge a personal surety will relieve the property.—*Denny v. Seeley*, 364.

EFFECT OF SELLING SECURITIES.

2. A surety is not released by the act of the creditor, pursuant to the principal debtor's direction, in selling for its market value collateral pledged by the debtor to secure the debt and applying the same as a credit, since the surety is not injured.—*Denny v. Seeley*, 364.

EFFECT OF SELLING SECURITIES WITHOUT CONSENT OF SURETY.

3. A surety is released only *pro tanto*, where the creditor, without his consent, releases some property which was intended by the debtor as security, or where, by the gross carelessness of the creditor, such property is lost.—*Denny v. Seeley*, 364.

RELEASE OF SURETY BY PREMATURE PAYMENT.

4. The payment of an installment on a contract in advance of the time provided by the contract discharges the surety on the contractor's bond against mechanics' liens only to the extent of such payment.—*Cochran v. Baker*, 555.

PROBATING WILLS.

No Adverse Parties in Such Proceedings. See WILLS, 1.

Effect of Probate on Administrator. See WILLS, 2.

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Undue Influence—Weight of Evidence. See WILLS, 3, 4.

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Directing Attention to Particular Points is Proper. See TRIAL, 8.

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Order Directing Mailing Forthwith. See SUMMONS, 8, 9.

Who May Mail Published Summons. See SUMMONS, 11.

PUBLIC LANDS.**RIGHT TO PURCHASE TIDE LAND.**

1. A purchaser of public lands under Laws, 1878, p. 41, § 5, providing, *inter alia*, that an application to purchase shall be accompanied by an affidavit that the purchaser has not directly or indirectly made any previous purchase of lands from the state, which, together with the lands described in his application, exceed a stated amount, depending on the class of land, is not entitled to purchase the maximum acreage of either class without regard to his previous purchase of lands belonging to the other class.—*Warren v. De Force*, 168.

TIDE LAND—INJUNCTION.

2. A tide land owner who does not have access therefrom to deep water because of a wharf in front of him cannot restrain the wharf owner from constructing below low water mark an approach to his property, since the tide land owner has no water rights to be affected.—*Welch v. Oregon Ry. & Nav. Co.*, 447.

PUBLIC LANDS—RATIFICATION OF AGENT'S ACT.

3. County school superintendents are not the agents of the state to execute deeds to its school lands, but the state ratifies and becomes bound by their contracts to convey such lands when it accepts and retains the purchase price.—*Am-brose v. Huntington*, 484.

PUBLIC OFFICIAL.

Tenure of Office—Holding Over After Expiration of Term—Power of Appointing—Where Located. See OFFICERS.

PUBLIC POLICY.**COLLATERAL ATTACK ON ORGANIZATION OF SCHOOL DISTRICT.**

The legal existence of a public or governmental corporation, organized under color of law, and in the exercise of its legitimate powers, cannot be attacked except in a direct proceeding by the state for that purpose.—*School District v. School District*, 97.

RAILROAD COMMISSIONERS.

APPOINTMENT OF AT EXPIRATION OF TERM.

No vacancy which the Governor is authorized to fill exists in the office of railroad commissioner after the expiration of the time fixed by law for such commissioners to hold office. The incumbent simply remains in office until his successor is elected and qualified.—*State ex rel. v. Compson*, 23.

RAILROADS.

ACCIDENT AT CROSSING—NEGLIGENCE A COMPLETE DEFENSE.

1. There can be no recovery for the death of one who was struck by a railway train at a grade crossing, where the evidence showed that, though such train was moving at a rate of speed prohibited by law, the proximate cause of the accident was the negligence of the deceased in approaching such crossing without exercising due caution.—*Blackburn v. Southern Pacific Company*, 215.

DUTY TO STOP AND LISTEN FOR TRAIN.

2. The failure of a person about to cross a railway track, on a highway at grade, to look and listen for an approaching train, or to stop for such purpose, where the view of the track is obstructed, or where there is noise which he may control, and which may prevent his hearing such train, is negligence *per se*, which will bar a recovery for an injury resulting from a collision with a train at such crossing.—*Blackburn v. Southern Pacific Company*, 215.

PREFERRED CLAIM TO BE PAID BY RECEIVER.

3. A claim for the purchase price of apparatus and appliances furnished to a street railway company, which enhanced the value of its property, but were not necessary to keep the enterprise a going concern, is not entitled, after the appointment of a receiver for the company, to a preference over a prior mortgage. The test of preferability is the actual necessity for the article furnished; if the mortgaged property could not be safely used without it, there is a preference for its price, otherwise not.—*McCornack v. Salem Railway Company*, 543.

RATIFICATION

Of Void Contract by Legislative Enactment. See CONST. LAW, 1.

Of Outstanding Warrants by Voting Bonds to Pay Them. See CONTR., 10.

RECEIVER.

BACK CLAIMS—PAYMENT BY RECEIVER.

An order appointing a receiver for a street railroad in foreclosure proceedings, and directing him to pay "all current expenses incident to the administration of his trust, and to the condition and operation of said business, from time to time, as the same arises and accrues," does not require the receiver to pay any debt not entitled to preference over the mortgage creditors, or such as accrued prior to his appointment.—*McCornack v. Salem Ry. Co.*, 543.

REPLEVIN.

EVIDENCE TO DISPROVE OWNERSHIP.

1. The minutes of the board of directors of a railroad company showing a contract with its manager in his individual capacity for the construction of its road are admissible to impeach the company's title to chattels in an action to recover them from an officer who seized them under execution against the manager, over the objection that the contract was not within sufficient proximity in point of time to the date of the purchase to create the presumption that the contractor was still working thereunder at the time of the purchase, where the minutes of subsequent meetings are introduced showing that up to and subsequent to the commencement of the action both parties treated the contract as subsisting.—*Cos Bay Railroad Company v. Siglin*, 80.

FORM OF JUDGMENT.

2. An alternative judgment for the sheriff in an action against him to recover property seized under execution, which was taken from him at the commencement of the proceeding, should be for the full value of the property, though it exceeds the amount due on the execution, where a third person is found to be the general owner.—*Cos Bay Railroad Company v. Siglin*, 80.

WHEN INADEQUATE TO OBTAIN A DEED.

3. When property has been paid for and the vendor will not execute a deed, or has lost one that he did execute and refuses to make another, replevin is not an adequate remedy.—*Boyes v. Ramsden*, 253.

RESCISSION.

Effect of Delay on Right of Rescission. See VENDOR AND PURCHASER, 1, 3.

Return of Consideration as a Condition Precedent. See VEND. AND PUR., 3.

RULES OF COURT.

WHEN OBJECTION SHOULD BE MADE.

An objection that appellant's abstract is not indexed as required by rule 9 of this court (24 Or. 596) comes too late after respondent has filed a brief on the merits of the case.—*Whipple v. Southern Pacific Company*, 370.

SCHOOL LANDS.

Power of County School Superintendent to Sell. See SCHOOLS, 3.

SCHOOLS AND SCHOOL DISTRICTS.

COLLATERAL ATTACK ON ORGANIZATION OF SCHOOL DISTRICT.

1. The legal existence of a public or governmental corporation, organized under color of law, and in the exercise of its legitimate powers, cannot be attacked except in a direct proceeding by the state for that purpose.—*School District v. School District*, 97.

APPEAL FROM DECISION OF COUNTY SUPERINTENDENT.

2. An appeal from an order of a county school superintendent to the State Superintendent of Public Instruction is not authorized by Section 2569, Hill's Ann. Laws, empowering the latter to exercise a general superintendence of the county and district school officers, and the public schools of the state, or section 2572, providing that he shall decide, without cost to the parties appealing, all questions and disputes that may arise under the school laws of the state.—*School District v. Irwin*, 431.

POWER OF SCHOOL SUPERINTENDENT TO SELL SCHOOL LAND.

3. A contract by the county school superintendent to convey school lands, though outside his authority, is ratified by the state's acceptance of the price, so as to bind it to make a deed to the lands.—*Ambrose v. Huntington*, 484.

SERVICE

Of Notice of Appeal on Adverse Party. See APPEAL, 15.

Of Summons by Publication. See SUMMONS, 4-13.

SERVITUDES.

Changing County Road Into City Street. See HIGHWAYS.

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Laws, 1878	P. 41	{ Section 3 Section 4 Section 5 }	<i>Warren v. De Force</i> , 169, 170, 171.
Laws, 1882	{ P. 15 P. 64 }	{ Section 26 Section 3 }	<i>State v. Turner</i> , 177-185. <i>Denny v. McCown</i> , 50.
Laws, 1887	P. 73	Section 2	<i>Warren v. De Force</i> , 172.
Laws, 1891	{ P. 8 P. 182 P. 26 P. 38 P. 78 P. 61 }	{ Section 27 Section 29 Section 59 Section 61 Section 62 Section 67 Section 9 Section 1 Section 6 Section 1 Section 6 }	<i>Van Winkle v. Crabtree</i> , 468-482. <i>Dayton v. Multnomah County</i> , 244. <i>Blagen v. Smith</i> , 399. <i>Whipple v. Southern Pacific Co.</i> , 370. <i>Denny v. McCown</i> , 49. <i>State ex rel. v. Estes</i> , 196, 197, 198.
Laws, 1895	{ P. 68 P. 421 }	{ Section 2 Section 3 Section 15 }	<i>Van Winkle v. Crabtree</i> , 468, 469. <i>Multnomah County v. City Ry. Co.</i> , 93.
Laws, 1898, P. 15 Spec. Sess.,		{ <i>Seton v. Hoyt</i> , 266. <i>Shipley v. Hacheney</i> , 308. }	

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Are Not an Additional Servitude on Streets. See STREETS, 2.

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Right to Graze on Unclosed Land. See **TRESPASS**.

SPECIAL QUESTIONS.

Character of Questions to be Submitted to Jury. See **TRIAL**, 5.

SPECIFICATION OF ERRORS.

Statement Must be Reasonably Certain. See **WRIT OF REVIEW**, 7.

Degree of Accuracy Required in Technical Motions. See **APPEAL**, 8.

STATE CONSTITUTION.

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STALE DEMAND. See **EQUITY**, 9, 10.

STATE LANDS.

Amount and Kind Purchasable Under Act of 1878. See **PUBLIC LANDS**, 1.

STATES.**POWER OF GOVERNOR TO APPOINT TO OFFICE.**

1. The power to fill a public office is not a prerogative of the Governor in the absence of a constitutional provision to that effect, but may be exercised by either the executive or the legislature.—*State ex rel. v. Compson*, 25.

HOLDING OVER—VACANCY IN OFFICE.

2. Mere failure of the legislature for any length of time to appoint successors to officers who are to hold office until their successors are elected and qualified, does not create a vacancy which the Governor may fill by appointment.—*State ex rel. v. Compson*, 25.

VACANCY—FILING BOND.

3. Failure of officers holding over till their successors are elected and qualified to renew their bonds does not, in the absence of a provision requiring such renewal, make a vacancy to be filled by the Governor.—*State ex rel. v. Compson*, 25.

APPOINTMENT OF RAILROAD COMMISSIONER.

4. No vacancy which the Governor is authorized to fill exists in the office of railroad commissioner after the expiration of the time fixed by law for such commissioners to hold office. The incumbent simply remains in office until his successor is elected and qualified.—*State ex rel. v. Compson*, 25.

TITLE AGAINST STATE BY ADVERSE POSSESSION.

5. Where the vendee has gone into possession of land under a binding contract with the state for its purchase, the statute of limitations begin to run against the state from the time of full payment of the price and the execution of a deed.—*Ambrose v. Huntington*, 434.

STATUTE OF FRAUDS.**AGENT—STATUTE OF FRAUDS—CHARACTER OF MECHANIC'S LIEN.**

1. The right of preserving and enforcing a mechanic's lien is not an interest in land, and an agent's authority to act with reference to it need not be in writing.—*Hughes v. Lansing*, 118.

PROMISE TO PAY ANOTHER'S DEBT—STATUTE OF FRAUDS.

2. A promise to pay another's debt in consideration of the receipt of property or a fund for that purpose is not within the statute of frauds, and may be proved by parol.—*Feldman v. McGuttre*, 309.

STATUTE OF LIMITATIONS.

DENIAL OF RIGHT NECESSARY TO START THE STATUTE.

1. A right by adverse user cannot be acquired to water in a stream or ditch so long as there is enough for both or all claimants; and until some one's use is curtailed there cannot be a cause of action against which to invoke the statute of limitations.—*North Powder Milling Co. v. Coughanour*, 10.

ADVERSE POSSESSION AGAINST THE STATE.

2. A vendee who has taken and maintained possession of state land under a contract with the state can obtain title by adverse possession as though the grantor had been a natural person.—*Ambrose v. Huntington*, 481.

ADVERSE CLAIM SUFFICIENT TO START THE STATUTE.

3. Enclosing a tract of land and continually using it under color of title and claim of right constitute such an adverse possession as will start the statute of limitations.—*Ambrose v. Huntington*, 481.

LIMITATION OF ACTIONS—LACHES—EQUITY.

4. While the statute of limitations is not a defense in equity, still the claimant must have exercised reasonable diligence in asserting his claim after ascertaining the fraud complained of, or after learning of facts which would put a person of ordinary intelligence on inquiry.—*Loomis v. Rosenthal*, 585.

LACHES—STALE DEMAND.

5. The purchaser of land at an administrator's sale held notorious and exclusive possession of it nineteen years, and fifteen years after the youngest heir became of age. The heirs lived in the same neighborhood, knew their father had owned the land, and visited the purchaser's family, and were notified of the administrator's sale. The purchaser cut the timber, erected costly buildings, and contributed a large sum towards bringing an electric railway from the city to the premises, and the land rapidly increased in value. The deeds showing the transactions were of record. Held, that the heirs were guilty of laches preventing their recovery of the land, notwithstanding no notice of the appointment of the administrator was served on them.—*Loomis v. Rosenthal*, 585.

STATUTES and STATUTORY CONSTRUCTION.

PORTLAND BRIDGES—CONSTRUCTION OF STATUTE.

1. The power conferred by the legislature upon the Bridge Committee of the City of Portland under Laws, 1895, p. 421, § 15, authorized the committee to enter into an original contract with a street railway company for the use of any of the bridges named. The statute does not restrict the committee to negotiations for the cancellation of existing rights.—*Multnomah County v. City Railway Co.*, 83.

CONSTRUCTION OF MORTGAGE TAX LAW.

2. The word "void," in the provision of Hill's Ann. Laws, § 2736, that all mortgages, deeds of trust, etc., whereby land situated in more than one county is made security for the payment of a debt shall be "void," is used in its ordinary sense, and does not mean "voidable," since the provision was designed to promote the public welfare by securing to the state the revenues from the assessment and taxation of real estate mortgages.—*Denny v. McCown*, 48.

MAKING VALID A VOID CONTRACT.

3. The repeal of Hill's Ann. Laws, § 2736 (making all mortgages or deeds of trust covering land in more than one county void), after the execution of such a deed of trust, but prior to the commencement of a suit to foreclose the same, does not have the effect of validating a lien on the property, as the deed, having been entirely void in its inception, was incapable of ratification.—*Denny v. McCown*, 48.

STATUTORY CONSTRUCTION—TRACTION ENGINES.

4. The words "steam portable or traction engine," as used in the first section of the act of November 25, 1885 (Hill's Ann. Laws, §§ 4136-4138), relating to the moving of "traction or portable engines on public highways," have the same meaning as the words "steam traction or portable engines," used in the third section of that act. The expressions are convertible and intended in both cases to apply only to engines propelled by steam, within the rule that words or phrases of doubtful meaning are controlled in their legal significance by like words or phrases appearing elsewhere in the same act, where such a construction is reasonable.—*Toedtemeier v. Clackamas County*, 66.

RULE FOR CONSTRUING DOUBTFUL PHRASES.

5. Words or phrases of doubtful or obscure meaning in a statute are controlled in their legal signification by the same or like words or phrases used or appearing elsewhere in the same or another act to which special reference is made, wherein by reason of the context, grammatical environment, or some specific or other explanation, they are rendered clear and their explanation definite, unless the object to which they are applied, or the connection in which they appear, renders them obscure or meaningless in that sense, or requires them to be differently understood.—*Toedtemeier v. Clackamas County*, 66.

RIGHT TO PURCHASE STATE LAND UNDER ACT OF 1878.

6. A purchaser of public lands under Laws, 1878, p. 41, § 5, providing, *inter alia*, that an application to purchase shall be accompanied by an affidavit that the purchaser has not directly or indirectly made any previous purchase of lands from the state, which, together with the lands described in his application, exceed a stated amount, depending on the class of land, is not entitled to purchase the maximum acreage of either class without regard to his previous purchase of lands belonging to the other class.—*Warren v. De Force*, 168.

EMINENT DOMAIN.

7. Prescribed proceedings for condemning private property for public use must always be strictly pursued.—*Huddleston v. City of Eugene*, 844.

AMENDMENTS ON APPEAL FROM JUSTICE'S COURTS.

8. Laws, 1898, p. 38, § 6, authorizing the circuit court, on appeal from a justice's court, to disregard irregularities and imperfections in matters of form as to the proceedings below, does not modify Section 2117, Hill's Ann. Laws, which prohibits an appeal from a justice's judgment given for want of an answer, since, there being no answer, there is no "matter of form" to be disregarded.—*Whipple v. Southern Pacific Company*, 370.

PROSPECTIVE AND RETROSPECTIVE STATUTES.

9. It is a general rule that laws are to be considered as prospective and not retrospective in their application unless the contrary clearly appears from the act and the surrounding circumstances.—*Seton v. Hoyt*, 286.

10. Act of October 14, 1898, changing the rate of interest, is not extended to outstanding warrants by the provision that, "inasmuch as the counties * * * are paying interest on their county warrants at the rate of eight per cent. per annum, thereby imposing a useless burden upon the taxpayers, this act shall become a law upon receiving the signature of the Governor."—*Seton v. Hoyt*, 286.

ELECTIONS—CONSTRUCTION OF LAW.

11. The provisions of the election act generally known as the Australian Ballot Law relating to the space in which the marking of the ballots shall be done are mandatory, although there is no provision rendering void a ballot not marked in the prescribed manner.—*Van Winkle v. Crabtree*, 482.

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UNITED STATES CONSTITUTION.

Article I, Section 10, *Seton v. Hoyt*, 266.

STIPULATION.

TRIAL—RESULT OF ANOTHER SUIT.

A stipulation between the parties to an action at law in which a cross bill in equity was interposed, that the suit in equity shall proceed to trial, and that the findings of fact shall be filed in the law action, and judgment entered accordingly, is of no effect where the court, of its own motion, dismissed the cross bill for want of jurisdiction.—*Small v. Lutz*, 131.

STOCK.

Right to Graze Over Uninclosed Land. See TRESPASS.

STREETS AND STREET IMPROVEMENTS.

TITLE TO LAND IN PUBLIC STREETS.

1. In view of Section 4184, Hill's Ann. Laws, providing that when a street is vacated the land theretofore so used shall vest in the abutting owners, the public has only an easement in such land.—*Huddleston v. City of Eugene*, 343.

PIPES AND SEWERS NOT A NEW SERVITUDE.

2. The use of a street for laying pipes, and constructing drains, sewers, and culverts, does not impose an additional servitude on the land, so as to prevent the conversion of a public road into a city street without additional compensation to the owner of the fee.—*Huddleston v. City of Eugene*, 344.

STREET IMPROVEMENT NOT A NEW SERVITUDE.

3. The fact that adjacent property is liable to assessment for maintaining and improving the street does not constitute an additional servitude for which additional compensation must be made as a condition of changing a country road into a city street.—*Huddleston v. City of Eugene*, 344.

SUBSTITUTION.

Death After Appeal—Time for Substitution. See PARTIES, 3.

Notice to Representatives of Deceased, When Necessary. See PARTIES, 4.

SUMMONS.

AMENDING RETURN ON SUMMONS.

1. Upon a proper showing being made a court may permit an officer to amend his return so that it shall conform to the truth; as for example, to show the date when he received a summons, where the date stated in the return is wrong.—*White v. Ladd*, 422.

NOTICE TO SUBSTITUTED PARTIES.

2. Where an original defendant was not served with summons, and had not appeared at the time of his death, the personal representative is not entitled to notice of an application for an order of continuance.—*White v. Ladd*, 422.

SUBSTITUTION FOR DECEASED PARTY.

3. The personal representative of a deceased defendant who died before being served with summons is substituted in his stead by the making of an order allowing an amended complaint to be filed in which the representative is named as a defendant, and directing service on her of the order, the amended complaint, and an *alias* summons.—*White v. Ladd*, 422.

COLLATERAL ATTACK ON JUDGMENT BASED ON PUBLICATION.

4. The judgment of a superior court against a nonresident acquired by a publication of summons cannot be attacked collaterally for any defect in the attachment proceedings, if such proceedings are not made by statute jurisdictional, unless the record affirmatively shows a want of jurisdiction; that is, if the seizure was complete, and the court had authority to pass on the cause of action, the judgment is conclusive on the world, regardless of all irregularities or defects in the attachment proceedings.—*Bank of Colfax v. Richardson*, 519.

ISSUING SUMMONS BEFORE WRIT.

5. A judgment *in rem* against attached property in Oregon is not subject to collateral attack because the record fails to affirmatively show that a summons was issued in the action at or before the issuance of the attachment.—*Bank of Colfax v. Richardson*, 519.

AFFIDAVIT FOR PUBLICATION—RESIDENCE OF DEFENDANTS.

6. An affidavit for publication of summons sufficiently shows, as against collateral attack, that defendants could not be served in the state, by a statement that they reside in the State of Washington, and that at the time of making the affidavit they were not in Oregon.—*Bank of Colfax v. Richardson*, 519.

RETURN OF "NOT FOUND."

7. A return of a summons "not found" is not a prerequisite of an order for service by publication, since Hill's Ann. Laws, § 50, merely requires that the inability to serve the defendant within the state shall appear by affidavit. The provision of section 50, that when it appears by the return that defendant is not found the plaintiff may deliver another summons to be served, or may proceed by publication, does not modify section 50.—*Bank of Colfax v. Richardson*, 520.

ORDER FOR PUBLICATION—MAILING SUMMONS “FORTHWITH.”

8. Though Hill's Ann. Laws, § 57, provides that the order for publication of summons shall direct that a copy of the complaint and summons be deposited “forthwith” in the postoffice, addressed to defendant, the omission of the word “forthwith” is not fatal to the proceedings, as against collateral attack, when it appears that the copies were mailed within a reasonable time after the date of the order.—*Bank of Colfax v. Richardson*, 520.

WHEN SUMMONS IS MAILED “FORTHWITH.”

9. A summons is mailed “forthwith,” under Section 57 of Hill's Ann. Laws, if it is deposited in the postoffice on the day of the first publication, provided such publication is within a reasonable time, as, say, a week, after the date of the order.—*Bank of Colfax v. Richardson*, 520.

PROOF OF SERVICE OF SUMMONS.

10. A judgment is not invalid on collateral attack simply because the proof of the service of the summons was not annexed to or indorsed on the summons itself.—*Bank of Colfax v. Richardson*, 520.

WHO MAY MAIL A PUBLISHED SUMMONS—CERTIFIED COPY.

11. Proof of the deposit of a copy of the complaint and summons in the postoffice pursuant to an order of service of publication need not be made by the sheriff or a person specially appointed therefor, but may be made by any one except the party himself.—*Bank of Colfax v. Richardson*, 520.

JUDGMENT ROLL—SUMMONS.

12. A judgment is not void and subject to collateral attack because the original summons does not appear in the judgment roll, where the proof of publication of summons as well as the findings and recitals in the judgment show that a summons was in fact issued.—*Bank of Colfax v. Richardson*, 520.

MAILING SUMMONS—CERTIFIED COPY NOT NECESSARY.

13. The copy of the summons mailed to the defendant in case of publication need not be certified.—*Bank of Colfax v. Richardson*, 520.

SUPPLEMENTAL COMPLAINT.

Appropriateness and Sufficiency of. See PLEADINGS, 5, 6.

SURETY. Same as PRINCIPAL AND SURETY.

TAXES AND TAXATION.

STATE BOARD OF EQUALIZATION—NECESSARY RECORD.

1. Under the law of 1891, the record on which the State Board of Equalization proceeds to equalize the assessments between different counties is an abstract of the different county records, and it is not necessary that the original rolls be filed at all.—*Dayton v. Multnomah County*, 239.

IRREGULAR CLASSIFICATION.

2. The fact that a designated class of property has been subdivided by a county assessor will not invalidate the roll, for by adding the subdivisions the required classification is obtained.—*Dayton v. Multnomah County*, 239.

REVIEW OF PROCEEDINGS OF BOARD OF EQUALIZATION.

3. The appellate court will not disturb the judgment and findings of a board of equalization where it is not shown that the board acted arbitrarily or fraudulently in the equalization of values.—*Dayton v. Multnomah County*, 239.

EQUALITY AND UNIFORMITY OF TAXATION.

4. The failure of the board of equalization properly to equalize assessments upon personal property throughout the several counties of the state does not produce such lack of equality and uniformity of taxation as to invalidate its acts in equalizing values upon real property.—*Dayton v. Multnomah County*, 239.

INJUNCTION—TENDER OF TAX.

5. A suit to enjoin the collection of part of a tax cannot be entertained until there has been a payment or tender of the amount admitted to be legal.—*Dayton v. Multnomah County*, 239.

COUNTY BOARD OF EQUALIZATION—POWER TO ASSESS.

6. A county board of equalization may assess property taxable in its county omitted by the assessor from the roll, and fix a valuation thereon, under Hill's Ann. Laws, §§ 2778, 2779, without other notice than the general one given under the statute by the assessor of the meeting of the board to correct and equalize the assessment roll.—*Kirkwood v. Ford*, 552.

REMISSION OF TAXES BY SHERIFF.

7. The sheriff is not authorized under Hill's Ann. Laws, § 232, to remit taxes where the assessment has been made by the board of equalization instead of the assessor—*Kirkwood v. Ford*, 552.

ESTOPPEL TO CLAIM REMISSION OF TAXES.

8. A taxpayer who personally appears before the board of equalization and makes oath that she is the owner and holder of certain property, is thereby precluded from having the taxes thereon remitted on her bare subsequent affidavit that she is not the owner.—*Kirkwood v. Ford*, 552.

TENANCY AT WILL.

Contract to Buy—Termination by Tender of Deed. See VEND. AND PUR., 11.

TENURE OF PUBLIC OFFICE.

When Vacancy Occurs—Holding Over After Term. See CONST. LAW, 1, 7.

TERM.

Right of Court to Amend Decree at Subsequent Term. See *Conrad v. Pacific Packing Company*, 338-341.

Power of Court to Correct Bill of Exceptions at Subsequent Term. See *State ex rel. v. Estes*, 204-206.

TIDE LANDS.

Amount Applicant Can Purchase Under Act of 1878. See PUB. LANDS, 1.

Injunction Against Wharf in Front of Tide Land. See PUBLIC LANDS, 2.

TRACTION ENGINES.

Use of on Highways and Bridges—Statutory Construction. See STAT., 4, 5.

TRANSCRIPT.

Where Official is Obligated to File—Effect of Absence or Insufficiency of Authenticating Certificate. See APPEAL, 18.

Amending by Adding Subsequent Order. See APPEAL, 14.

TRESPASS.**ANIMALS RUNNING AT LARGE—FENCES.**

1. Where the fence law is applicable the common law liability for injury by domestic stock to uninclosed land is abrogated; unimproved and uninclosed lands are common pasturage.—*Walker v. Bloomingcamp*, 391.

STOCK PASTURING ON UNINCLOSED LAND.

2. In permitting stock to graze over uninclosed land the owner is not guilty of any actionable injury, and the fact that there is a herder to protect the animals does not change the rule.—*Walker v. Bloomingcamp*, 391.

TRIAL**STIPULATION TO ABIDE RESULT OF EQUITY SUIT.**

1. A stipulation between the parties to an action at law in which a cross bill in equity was interposed, that the suit in equity shall proceed to trial, and that the findings of fact shall be filed in the law action, and judgment entered accordingly, is of no effect where the court of its own motion dismissed the cross bill for want of jurisdiction; and the law action must then proceed as if the cross bill had never been filed or the stipulation made.—*Small v. Lutz*, 131.

OPENING DEFAULT IS DISCRETIONARY.

2. The setting aside of a default judgment is peculiarly a matter of discretion, and the fact that a successful defense has afterwards been made is a cogent reason for not disturbing the order.—*Cros Bay Navigation Co. v. Endicott*, 573.

SETTING ASIDE JUDGMENT.

3. The discretion of the trial court in setting aside a default judgment upon an application made two days after such default, will not be disturbed on appeal where it appears from the affidavits of defendant's attorney in support of the motion that the practice prevailed that, unless the time for answering expired before the beginning of the term, the cause would go over, and that the default was entered and the jury called to assess the damages pending negotiations in reference to the subject-matter of the litigation.—*Cros Bay Navigation Company v. Endicott*, 573.

EVIDENCE OF ATTEMPTED COMPROMISE.

4. Evidence of negotiations between the parties to a suit concerning the subject of the litigation, is inadmissible where they were unable to agree.—*Coos Bay Navigation Co. v. Endicott*, 574.

SPECIAL QUESTIONS OF FACT.

5. Questions submitted to a jury under Section 215, Hill's Ann. Laws, should relate to some probative fact upon which the rights of the parties depend, and which would determine the case, and not to mere evidentiary facts which may be only *prima facie* evidence of other facts or of the fact to be proved.—*White v. White*, 142.

DUTY OF COURT TO DIRECT A VERDICT.

6. In an action for injuries received by a traveler on the highway, at a railway crossing, it is the duty of the court to direct a verdict for defendant, where the uncontradicted evidence shows the omission of a duty which the law requires of such traveler.—*Blackburn v. Southern Pacific Co.*, 215.

INSTRUCTION—CONFLICTING EVIDENCE.

7. Where the evidence as to plaintiff's ownership of the property in litigation is conflicting, it is error to require the jury to find the title to the property in such plaintiff.—*Coos Bay Railroad Co. v. Siglin*, 80.

USURPING PROVINCE OF JURY.

8. It is not improper for a court, in order to attract the attention of the jury to a specific point of law, to tell them that there is evidence tending to show a certain controverted fact.—*Coos Bay Railroad Co. v. Siglin*, 80.

NONSUIT.

9. Where there is evidence from which a jury may reasonably infer that the allegations of a complaint are true a nonsuit should not be granted.—*Feldman v. McGuire*, 300.

DEFECT OF PARTIES IS MATTER IN ABATEMENT.

10. An objection to a complaint for want of parties is matter in abatement; if the defect is apparent from an inspection of the complaint, the objection should be made by demurrer, otherwise by answer specially naming the omitted persons.—*North Powder Milling Company v. Coughanour*, 10.

TRUST FUNDS. See INSOLVENTS.

TRUSTS AND TRUSTEES.

EFFECT OF COMMINGLING TRUST FUNDS.

Where a trustee deposited trust funds to his credit in his own bank, and such funds were commingled with and used as a part of the general funds of the bank, in the ordinary course of its business, so that the identity of the trust fund was wholly lost, the trust creditor is not entitled to a preference over other creditors out of money left in the bank upon an assignment by the trustee for creditors.—*Shute v. Hinman*, 578.

UNDUE INFLUENCE.

Gratitude or Esteem is not Undue Influence. See WILLS, 4.

UNITED STATES CONSTITUTION.

Article I, Section 10, *Seton v. Hoyt*, 206.

USAGES.

Presumption of Reasonableness. See CUSTOM AND USAGE.

VACANCY IN PUBLIC OFFICE.

Power to Fill—Holding After Expiration of Term. See OFFICERS.

VENDOR AND PURCHASER.

CONSTRUCTIVE FRAUD—RESCISSION.

1. Representations made by the vendors of real estate respecting the condition of the title, which, though innocently made, were false in fact, and were relied on by the purchaser, constitute such a constructive fraud as will authorize a court of equity to treat the deed as an executory contract to convey, and to decree the rescission thereof.—*Faughn v. Smith*, 54.

RESCISSION OF CONTRACT—DUTY OF INJURED PARTY.

2. A vendee desiring to rescind a contract on the ground of fraud, accident, or mistake, must proceed promptly, on the discovery of the alleged infirmity, to place the other party *in statu quo* by returning or offering to return that which he has received.—*Vaughn v. Smith*, 54.

RESCISSION—EFFECT OF DELAY.

3. A grantee loses his right to rescind a deed and recover the purchase price because of false representations by the grantor by remaining in possession and making improvements and exercising a general ownership after discovering the falsity of the representations.—*Vaughn v. Smith*, 54.

OCCUPATION AS NOTICE TO A PURCHASER.

4. The open, notorious and exclusive possession and occupancy of real property by a stranger to the title puts a purchaser from a third person upon notice and inquiry concerning the rights and equities of the party in possession, and charges him with all the knowledge that he might have obtained upon reasonable inquiry.—*Ambrose v. Huntington*, 485.

WHEN POSSESSION UNDER BOND FOR DEED BECOMES ADVERSE.

5. Where a vendee has gone into possession of land under a contract to purchase, his holding is adverse to the vendor from the time he complies with his part of the agreement, and the same rule applies to the state as to a natural person.—*Ambrose v. Huntington*, 484.

RIGHT CONFERRED BY BOND FOR DEED.

6. A bond for a deed transfers to the obligee an equitable interest in the land agreed to be conveyed, the legal title remaining with the obligor in trust for the purchaser.—*Sievers v. Brown*, 454.

BOND FOR DEED—RIGHT OF GRANTEE TO POSSESSION.

7. Unless particularly specified, a bond for a deed does not entitle the obligee to possession.—*Sievers v. Brown*, 454.

INTEREST AS CONSIDERATION FOR POSSESSION UNDER A BOND.

8. Where the obligee in a bond for a deed takes possession, the payment of interest on deferred installments of the purchase price is usually sufficient compensation for the use of the premises until the maturity of the debt under the bond.—*Sievers v. Brown*, 454.

LIABILITY FOR RENT FROM REFUSAL TO PAY.

9. A vendee in possession of real property under a contract for its purchase is liable to the vendor for the reasonable rent thereof from the date of his refusal to carry out the contract.—*Sievers v. Brown*, 454.

FORFEITURE UNDER BOND FOR DEED.

10. The obligor in a bond for a deed cannot demand compliance with the contract by the obligee, or declare a forfeiture for a breach thereof, until he is himself prepared to comply with its terms, and has tendered a deed.—*Sievers v. Brown*, 454.

WHEN TENANCY UNDER A BOND TERMINATES.

11. The tenancy at will initiated between a vendor and vendee of real property by the failure of the latter to carry out the contract of sale is terminated by a tender of compliance therewith by the vendor, coupled with the ability to make good the tender.—*Sievers v. Brown*, 454.

RIGHT OF TENANT UNDER A BOND TO EMBLEMENTS.

12. A vendee who is in possession of real property as a tenant at will under a bond for a deed, the terms of which he has broken, is entitled to the crops sown thereon before such tenancy was ended, but not to such as were sown after notice to quit.—*Sievers v. Brown*, 454.

FORECLOSURE SUIT IS NOTICE TO VENDEE TO QUIT.

13. The commencement of a suit to foreclose a bond for a deed is equivalent to a notice to the vendee in possession to quit, within the terms of Section 3523, Hill's Ann. Laws, giving a tenant the right to harvest a crop sown before receiving a notice to quit.—*Sievers v. Brown*, 454.

VENUE.**MEDICAL BOARD—APPEAL—VENUE.**

An appeal from the Board of Medical Examiners will not be dismissed where the motion to dismiss recites that the hearing by the board was in the county to the circuit court of which the appeal has been taken as required by

law, and the verdict and decision of the board purports to have been made in that county, although the regular meetings of the board are required to be held in another county.—*State ex rel. v. Estes*, 187.

VERDICT.

PLEADING—AIDER BY VERDICT.

7. In an action for commissions on insurance effected by plaintiff, the omission of the complaint to state whether any insurance was effected or whether any sum was collected is cured by a verdict, where the rate of commissions and the amount due for acting as defendant's agent is alleged.—*Foste v. Standard Insurance Company*, 125.

VERITY OF RECORD will be Presumed on Appeal. See APPEAL, 18, 19.

VOTERS.

Marking Ballots—Testimony of Illegal Voters—Rejecting Ballots. See ELECTIONS.

WAIVER.

DEFECT OF PARTIES—APPEAL.

1. Where the objection of a defect of parties is not made before the trial court it is considered as having been waived; it cannot be first urged before the supreme court.—*State ex rel. v. Estes*, 187.

2. Where it appears from the face of a complaint that other persons should be brought in, the objection ought to be made by demurrer; otherwise, by answer particularly naming the omitted parties.—*North Powder Milling Company v. Coughanour*, 10.

PLEADING WAIVER.

3. It is proper to plead a waiver of a mechanic's lien as such rather than to set up the matters and things which gave rise to it by way of estoppel.—*Hughes v. Lansing*, 118.

EFFECT OF WAIVING CLAIM FOR MATERIALS.

4. A waiver of all claims for materials furnished to the contractor, and used in certain buildings, is equivalent to a waiver of the right or privilege of claiming a lien therefor against the property.—*Hughes v. Lansing*, 118.

TRIAL WITHOUT OBJECTION—DEFECTIVE ANSWER.

5. Where trial was had, without objection, on an answer purporting to deny the material allegations of the complaint, it cannot be afterwards urged on writ of review that the answer was insufficient.—*Long v. Thompson*, 359.

WATERS AND WATER RIGHTS.

CONSTRUCTION OF GRANT OF WATER RIGHT.

1. The owner of a mill and an appurtenant water right was unable to get wheat to grind, and hence appropriated a portion of the water of a tributary creek eleven miles above the mill to irrigate land to be cultivated in wheat. Afterwards he conveyed the land, irrigation ditch, and appurtenant water right, without reservation, representing that part of the land needed water only in dry seasons, and that the water could be sold to good advantage; that he owned the water right on account of the mill; that the ditch could be enlarged to any size; and that the land would make one of the best wheat farms in the valley. *Held*, that the grantee's right was limited to the use of water to irrigate land for the growth of wheat.—*North Powder Milling Co. v. Coughanour*, 10.

WATER RIGHT—PRIORITY.

2. One to whom the owner of a mill sends a letter, stating that if he buys certain land from the writer the latter will give him, on paying a specified amount, half of a ditch diverting water from the mill race, cannot claim any interest in the water of such ditch as against one to whom the mill is sold before the deed to the ditch is executed.—*North Powder Milling Co. v. Coughanour*, 10.

RIGHT OF RIPARIAN PROPRIETOR.

3. The first settler on a stream may either divert the water or exercise his common law right to have it flow in its accustomed channel, but he cannot do both.—*North Powder Milling Co. v. Coughanour*, 10.

ADVERSE USER AS FOUNDATION OF TITLE.

4. A right by adverse user cannot be acquired to water in a stream or ditch so long as there is enough for both or all claimants; and until some one's use is curtailed there cannot be a cause of action against which to invoke the statute of limitations.—*North Powder Milling Co. v. Coughanour*, 10.

TIDE LAND—INJUNCTION.

5. A tide land owner who does not have access therefrom to deep water because of a wharf in front of him cannot restrain the wharf owner from constructing below low water mark an approach to his wharf, since the tide land owner has no water rights to be affected.—*Welch v. Oregon Ry. & Nav. Co.*, 447.

WHARVES.

TIDE LAND—ESTOPPEL TO OBJECT TO WHARF.

1. An owner of upland bordering on a navigable stream, having a right to build a wharf at deep water in front of his property, who transfers his wharf privilege, is thereby estopped from objecting to the maintenance of a wharf built on the faith of his conveyance, even though he subsequently acquires from the state the tide land between the upland and the wharf.—*Welch v. Oregon Railway and Navigation Company*, 447.

TIDE LAND—INJUNCTION AGAINST APPROACH TO WHARF.

2. A tide land owner who does not have access therefrom to deep water because of a wharf in front of him cannot restrain the wharf owner from constructing below low water mark an approach to his wharf since the tide land owner has no water rights to be affected.—*Welch v. Oregon Ry. and Nav. Co.*, 447.

WILLS.

PROBATING WILL—ADVERSE PARTIES.

1. In probating a will in Oregon there are no "adverse parties" to be notified, since the proceeding is entirely *ex parte*. It is the duty of the county court to probate a will with convenient speed after its presentation, and no one is entitled to notice as a matter of right.—*Malone v. Cornelius*, 192.

EFFECT OF PROBATING WILL.

2. Where a will is admitted to probate, and letters issued thereunder, the powers of any administrator who may have been previously appointed cease immediately.—*Malone v. Cornelius*, 192.

WEIGHT OF EVIDENCE—APPEAL.

3. The conclusion of the county judge who heard the witnesses, and was the neighbor of most of them, upon the issue as to undue influence in procuring the execution of a will is entitled to great weight on appeal, and his decision will be upheld unless the appellate court can say from an examination of the record that the weight of the testimony is the other way.—*In re Darst's Will*, 58.

UNDUE INFLUENCE.

4. Influence arising from gratitude or esteem is not undue, nor can it become such unless it destroys the free agency of the testator at the time the instrument is made, and results in determining the execution in the particular manner adopted.—*In re Darst's Will*, 58.

5. Testatrix executed her will, making her favorite sister, with whom she had lived many years, and who was wealthy, residuary legatee of the bulk of her estate. That sister was provident, and testatrix's other sisters were not, and there was ill feeling between such others and the testatrix and the favorite sister. One of the improvidents, however, had served testatrix faithfully for eleven years, and was ill and needy, and received only a slight devise, and another also received a small legacy, and two others were given nothing. There was evidence that the testatrix was unduly influenced by the favorite sister, and that the latter had been seen and overheard talking in low tones to testatrix about the disposition of her estate as to the other sisters. She denied having influenced testatrix, and there was evidence that the latter was of strong will; but, to contradict it, there was evidence that she had been sick, and that her will was weakened. The testimony of attending physicians was in conflict. *Held* not to warrant a reversal of the finding that there was no undue influence.—*In re Darst's Will*, 58.

WILLS—CONSTRUCTION.

6. Where a testator directed his residuary estate to be converted into cash, and divided "equally among the heirs at law," such heirs take *per capita*, and not *per stirpes*, regardless of the degree of relationship to the testator.—*Ramsey v. Stephenson*, 408.

WORDS AND PHRASES.

"ALL OFFICERS."

The meaning of the expression "All officers" used in the Constitution of Oregon, Article XV, § 1, is not limited to those officers named or provided for in that document, or to such as are chosen by popular election, nor is it limited at all except as to members of the legislature.—*State ex rel. v. Compson*, 25.

"ASSUME."

To assume means to undertake, engage or promise.—*Pelleys v. Comer*, at p. 39.

"ELECTED."

The word "Elected" in the Constitution of Oregon, Article XV, § 1, providing that public officers shall remain in office until their successors are "elected and qualified" does not refer solely to a selection by the people, but includes a choice by the legislative assembly.—*State ex rel. v. Compson*, 25.

"FORTHWITH."

A summons is mailed "forthwith," under Section 57 of Hill's Ann. Laws, if it is deposited in the postoffice on the day of the first publication, provided such publication is within a reasonable time, as, say, a week, after the date of the order.—*Bank of Colfax v. Richardson*, 520.

"PILOT" AND "PILOTAGE."

A master of a tugboat which is towing a vessel lashed alongside, who directs the movements of the tow by orders to its crew from the tug, is not a pilot, and is not engaged in an act of pilotage under Section 1908, Hill's Ann. Laws.—*State v. Turner*, 173.

A pilot is a person who boards a vessel at a particular place for the purpose of guiding her through a channel, or from or into a port.—*State v. Turner*, 173.

"REASONABLE CHARGES."

Attorney's fees incurred in the preparation for foreclosure proceedings are not "reasonable charges" within Hill's Ann. Laws, § 3034, prescribing a penalty for the neglect or refusal of a mortgagee upon request to discharge a mortgage after performance of the conditions and tender of his "reasonable charges," by that term the statute contemplates only such charges as may reasonably be incurred in the matter of the discharge of the mortgage.—*Malarkey v. O'Leary*, 404.

"SETTLEMENT."

The word "settlement," as used in a contract requiring a collector to pay in moneys as he collects, and make a complete settlement on certain days, means payment, and not a computation of accounts.—*McKinney v. Statesman Publishing Company*, 500.

"VOID."

The word "void," in Hill's Ann. Laws, § 2736, providing that all obligations whereby land situated in more than one county in the state is made security for the payment of a debt shall be void,—must be given its ordinary meaning of null and incapable of confirmation, since it is apparent that the purpose of the section is to secure to the state the revenues to be obtained from the assessment and taxation of mortgages of real property.—*Denny v. McCown*, 47.

WRIT OF REVIEW.

TO BRING UP PROBATE PROCEEDINGS.

1. A writ of review is a proper means of bringing into the circuit court the probate proceedings of a county court in some cases.—*Malone v. Cornelius*, 192.

REFUSAL TO PROBATE A WILL.

2. An heir and legatee under a will that is presented for probate is injuriously affected in a "substantial right" by the refusal of the county court to take proof of the will, so as to be entitled to a writ to review the proceedings.—*Malone v. Cornelius*, 192.

INSUFFICIENT ANSWER NOT GROUND FOR REVIEW.

3. Where trial was had in a justice's court on an answer purporting to deny the material allegations of the complaint it cannot be afterwards urged on writ of review that the answer was insufficient.—*Long v. Thompson*, 359.

EFFECT OF INSTRUCTING JURY IN JUSTICE'S COURT.

4. The assumption by a justice of the peace of the right to instruct the jury in a case on trial before him, even if unauthorized, does not affect his jurisdiction, nor afford ground for disturbing his judgment on a writ of review.—*Long v. Thompson*, 380.

NEGLECT TO SETTLE COST BILL.

5. The neglect of a justice of the peace to pass upon objections made by a party to a cost bill affords no ground for vacating and setting aside the justice's judgment upon a writ of review.—*Long v. Thompson*, 359.

REQUIRING ADDITIONAL BOND FOR COSTS.

6. An error of a justice of the peace in requiring plaintiff to give an additional undertaking for costs and disbursements, after he had already made a deposit for that purpose, is not a sufficient ground for vacating by writ of review the justice's judgment after a trial on the merits.—*Long v. Thompson*, 359.

CONSTRUCTION OF PETITION FOR WRIT.

7. The circuit court does not acquire jurisdiction under Hill's Ann. Laws, § 584, to review the acts and determination of the county school superintendent by a petition for a writ of review describing definitely and certainly the determination of the State Superintendent of Public Instruction on an alleged appeal from such county school superintendent, who is made a party, and whose determination is set out, where the only error alleged is that relating to the decision of the State Superintendent of Public Instruction. If the petitioner desired to review the acts of the county superintendent, he should have alleged the errors committed by that official.—*School District v. Irwin*, 431.

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